87-1584

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GELDERMANN, INC., ~~and BOARD OF TRADE OF THE CITY OF CHICAGO,~~

Petitioners,

vs.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 5a(11) of the Commodity Exchange Act (7 U.S.C. §7a(11)) by requiring unwilling arbitration of common law claims abridges the Seventh Amendment.

2. Whether Section 5a(11) of the Commodity Exchange Act by depriving a broker of a district court determination of common law disputes with its customers abridges rights secured by Article III, Section 1 of the Constitution.

3. Whether Congress has unconstitutionally conditioned a commodity broker's practice of its business on the sacrifice of Seventh Amendment and Article III rights by requiring it to arbitrate customer-initiated common law claims as a condition of membership in a contract market where membership is a matter of economic necessity?

RULE 28.1 LISTING

Petitioner is a wholly owned subsidiary of ConAgra, Inc. Because of their large number, its affiliates are listed in the Appendix.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 28.1 LISTING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF CASE	4
A. The Challenged Mandatory Arbitration Rule	4
B. The Present Controversy	6
REASONS FOR GRANTING THE WRIT	10
I.	
ABSENT A CONSTITUTIONALLY VALID WAIVER, GELDERMANN WAS ENTITLED UNDER THE SEVENTH AMENDMENT TO A JURY TRIAL OF FSI'S CLAIMS	10
II.	
ABSENT A CONSTITUTIONALLY VALID WAIVER, GELDERMANN WAS ENTITLED TO TRY FSI'S CLAIMS IN AN ARTICLE III FORUM	17
A. Article III's Personal Guarantees	18
B. Non-Waivable Article III Interests	19

III.

CONGRESS MAY NOT CONSTITUTIONALLY CONDITION A COMMODITY BROKER'S PURSUIT OF ITS BUSINESS ON ITS "CONSENT" TO MANDATORY ARBITRATION OF COMMON LAW CLAIMS 22

CONCLUSION 30

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit, December 22, 1987 . App. 1

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, December 30, 1986 ..... App. 27

Affidavit of Kevin Mack ..... App. 40

Rule 28.1 Listing ..... App. 46

TABLE OF AUTHORITIES

CASES:	PAGE
Abie State Bank v. Byran, 282 U.S. 765 (1931) ..	23
Ames v. Merrill Lynch, 567 F.2d 1174 (2d Cir. 1977)	14
Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977)	12, 13, 14
Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838 (2d Cir. 1971)	28
Block v. Hirsh, 256 U.S. 135 (1921)	14
Board of Trade v. CFTC, No. 81 C 7175 (N.D. Ill.)	6, 29
Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co., Inc., 90 FRD 313 (E.D.N.Y. 1981)	12
Coenen v. R.W. Pressprich, 453 F.2d 1209 (2d Cir. 1972)	28
Commodity Futures Trading Commission v. Schor, ____ U.S. ____, 92 L.Ed.2d 675 (1986)	9, 18, 19, 20, 21, 22, 30
Curtis v. Loether, 415 U.S. 189 (1974)	12, 14
Dairy Queen v. Wood, 369 U.S. 469 (1962) ...	11, 12, 17
Essary v. Chicago and North Western Transportation Co., 618 F.2d 13 (7th Cir. 1980)	13
Farmers-Peoples Bank v. United States, 477 F.2d 752 (6th Cir. 1973)	12
Felkner v. Dean Witter Reynolds, Inc., 800 F.2d 1466 (9th Cir. 1986)	16

Frost v. Railroad Commission, 271 U.S. 583 (1926) 24, 26

Fuentes v. Shevin, 407 U.S. 67 (1972) 25, 26

Garrity v. New Jersey, 385 U.S. 493 (1967) ... 23, 27

Hobbie v. Unemployment Appeals Commission, ___ U.S. ___, 94 L.Ed.2d 190 (1987) 23

K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) 25

King v. United Benefit Fire Insurance Co., 377 F.2d 728 (3rd Cir.), *cert. denied*, 389 U.S. 857 (1967) 12

Lamont v. Postmaster General, 381 U.S. 301 (1965) . 23

Lovell v. City of Griffin, 303 U.S. 444 (1937) 23

McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987) . 23

Merrill Lynch v. Hovey, 726 F.2d 1286 (2d Cir. 1984) 28

Murdock v. Pennsylvania, 319 U.S. 105 (1943) .. 23

Myers v. United States District Court, 620 F.2d 741 (9th Cir. 1980) 12

Myron v. Hauser, 673 F.2d 994 (8th Cir. 1982) .. 13, 14

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 11

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 13

National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977) 25

National Federation of Federal Employees v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987) 23

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 18, 19

Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972) . 25, 26

PaineWebber v. Chase Manhattan, 728 F.2d 577 (2d Cir. 1984) 28

Parsons v. Bedford, 28 U.S. 432 (1830) 11

Patten Securities v. Diamond Greyhound & Genetics, 819 F.2d 400 (3rd Cir. 1987) 27, 28

Pearce v. E.F. Hutton, Inc., 828 F.2d 833 (D.C. Cir. 1987) 28, 29

Pernell v. Southall Realty, 417 U.S. 363 (1974) .. 11

Prudential Oil Corp. v. Phillips Petroleum Co., 392 F.Supp. 1018 (S.D.N.Y. 1975) 12

Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972) . 12

Rosenthal & Co. v. Bagley, 581 F.2d 1258 (7th Cir. 1978) 14

Rosenthal & Co. v. CFTC, 614 F.2d 1121 (7th Cir. 1980) 14

Ross v. Bernhard, 396 U.S. 531 (1970) 11, 12

Shearson Hayden Stone, Inc. v. Scrivener, 671 F.2d 680 (2d Cir. 1982) 16

Sherbert v. Verner, 374 U.S. 398 (1963) 23

Similar v. Conner, 327 U.S. 221 (1976) 12

Skidmore v. Consolidated Rail Corp., 619 F.2d 157 (2d Cir. 1979) 13

Slochower v. Board of Education, 350 U.S. 551 (1956) 23

Smoky Greenhaw Cotton v. Merrill Lynch, 720 F.2d 1446 (5th Cir. 1983) 15, 16

Spevack v. Klein, 385 U.S. 511 (1967) 23, 25

Terral v. Burke Constr. Co., 257 U.S. 529 (1922) . 23, 25

Thomas v. Collins, 323 U.S. 516 (1944) 23

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 87 L.Ed.2d 409 (1985) 9, 18, 19, 27

Tull v. United States, ___ U.S. ___, 95 L.Ed.2d 365 (1987) 11

Union Pacific R.R. Co. v. Public Service Commission, 248 U.S. 67 (1918) 23, 24, 25

United States v. Jepson, 90 F.Supp. 983 (D.N.J. 1953) 12

Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1909) 23

STATUTES:

Commodity Exchange Act, as amended, 7 U.S.C. §1, *et seq.*:

Section 4d(1) 6

Section 5a(11) ..... *passim*

Section 8a(7) 5

Futures Trading Act of 1982, Pub. L. 97-444, §217(a) 6

COMMODITY FUTURES TRADING COMMISSION REGULATIONS:

17 C.F.R. §7.201 5

17 C.F.R. §180.1(a) 15, 16

17 C.F.R. §180.2 5

MISCELLANEOUS:

Article III, §1, U.S. Const. (1787) 2, 17, 18

Amendment VII, U.S. Const. (1791) 2, 11

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 8

41 *Fed. Reg.* 27520 (July 2, 1976) 15, 16

46 *Fed. Reg.* 57457 (Nov. 24, 1981) 5

CBT Regulation 603.01(B) 5, 15, 16

CBT Regulation 620.01(B) 3, 4, 5, 8, 14, 17

Ill.Rev.Stat. ch. 1, ¶801 (1985) 15

Moore's Federal Practice, ¶38.11[5] at 38-78 to 38-80 12

47 *Am.Jur.2d* Jury §43 (1969) 12

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COMMODITY FUTURES TRADING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Geldermann, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 22, 1987.

OPINIONS BELOW

The decision of the district court has not been officially reported. The decision of the Seventh Circuit Court of Appeals is reported at 836 F.2d 310. Both opinions appear in the Appendix.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 22, 1987. Petitioner files this petition within 90 days from that date and invokes this Court's jurisdiction under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law."

Article III, §1 of the U.S. Constitution provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Section 5a(11) of the Commodity Exchange Act, 7 U.S.C. §7a(11), 1974 version provides:

> "Each contract market shall provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the

settlement of customers' claims and grievances against any member or employee thereof: Provided, that (i) the use of such procedure by a customer shall be voluntary, (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or a floor broker."

Section 5a(11) of the Commodity Exchange Act, 7 U.S.C. §7a(11), 1983 version provides:

"Each contract market shall provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: Provided, That (i) the use of such procedure by a customer shall be voluntary, and (ii) the term "customer" as used in this paragraph shall not include another member of the contract market."

17 C.F.R. §7.201 and Board of Trade of the City of Chicago Rule 620.01(B) provide:

"The Arbitration Committee and Mixed Panels constituted pursuant to Regulation 620.02 have jurisdiction to arbitrate all Customers' Claims and Grievances against any member or employee thereof which have arisen prior to the date the customer's claim is asserted. If the customer elects to initiate an arbitration proceeding of any customer claim or grievance, the member shall submit to arbitration in accordance with these Arbitration Rules and Regulations. The arbitration shall be initiated by delivery to the Administrator of (a) a Statement of Claim and a "Chicago Board of Trade Arbitration Submission Agreement for Customer's Claims and Grievances" signed by the customer or (b) a Statement of Claim and another arbitration agreement between the parties, which agreement conforms in all respects with any

applicable requirements prescribed by the Commodity Futures Trading Commission. The refusal of any member or employee to sign the "Chicago Board of Trade Arbitration Submission Agreement for Customer's Claims and Grievances" shall not deprive the Arbitration Committee or a Mixed Panel constituted pursuant to Regulation 620.02 of jurisdiction to arbitrate customers' claims under these Arbitration Rules and Regulations. The Committee and Mixed Panels have jurisdiction to arbitrate a counterclaim asserted in such an arbitration, but only if it arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties or third persons over whom the Association does not have jurisdiction. Other counterclaims are subject to arbitration by the Committee, or a Mixed Panel, only if the customer agrees to the submission after the counterclaim has arisen."

STATEMENT OF THE CASE

A. The Challenged Mandatory Arbitration Rule.

The Commodity Exchange Act, 7 U.S.C. §1 *et seq.* (the Act), through which Congress regulates the future industry, provides that commodity futures contracts may be entered into only on contract markets (also called commodity exchanges) designated by the Commodity Futures Trading Commission, the federal agency charged with enforcement of the Act. As part of the 1974 amendments to the Act, Congress passed Section 5a(11) which requires that contract markets

> "Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against a member or employee thereof: Provided, that (i) the use of the pro-

> cedure by a customer shall be voluntary . . . [and] the procedure shall not result in any compulsory payment except as agreed upon between the parties. . . ." 7 U.S.C. §7a(11) 1974).

To effectuate Section 5a(11) the Commission adopted regulations in 1976 which required contract markets to "adopt rules which provide for a fair and equitable procedure through arbitration or otherwise for the settlement of customer's claims and grievances against any member" and set forth minimum requirements for those procedures. 17 C.F.R. §180.2 (1976). The Commission believed that these regulations call for a procedure under which a contract market member "*must* arbitrate when called upon to do so". 46 *Fed. Reg.* 57457, 57461 (Nov. 24, 1981) (emphasis added).

In early 1977 one contract market, the Chicago Board of Trade, proposed to implement §180.2 by an exchange regulation providing for arbitration of customer grievances on a voluntary basis. When the CBT refused to make customer-initiated arbitration mandatory for exchange members, the Commission, invoking powers under Section 8a(7) of the Act, forced the CBT in November, 1981 to adopt CBT Regulation 620.01(B) (the Rule) under which a customer could *compel* a CBT member to submit to arbitration: "If the customer elects to initiate an arbitration proceeding of any customer claim or grievance, the member *shall* submit to arbitration . . . ." See Commission Regulation §7.201, 17 C.F.R. §7.201, altering CBT Regulation 620.01(B); 46 *Fed. Reg.* 57457 (Nov. 24, 1981). CBT Regulation 603.01(B) defines "claims or grievance" to mean, in relevant part: "Any dispute which arises out of any transaction on or subject to the rules of the Exchange . . . executed by or effected through a member of the Association . . . ."

The CBT promptly challenged the Rule on the grounds that the Commission acted arbitrarily in promulgating it

and that the requirement that exchange members unwillingly participate in arbitration abridged members' Seventh Amendment right to a jury trial. *Board of Trade v. CFTC*, No. 81 C 7175 (N.D. Ill.). The district court held that Section 5a(11) did not require the Commission to adopt a *mandatory* arbitration procedure and that the Rule violated the Seventh Amendment by compelling CBT members to arbitrate common law legal claims. The Seventh Circuit reversed on grounds of ripeness, 704 F.2d 929 (1983) (*Board*), shortly after Congress had amended Section 5a(11) by deleting subsection (iii) which provided that the required dispute resolution procedure "shall not result in any compulsory payment except as agreed upon by the parties. . . ." Pub. L. 97-444, §217(a). After the reversal, the CBT under protest inserted the Rule in its rulebook with a footnote setting forth verbatim a prescription given in *Board* for challenging it:

> "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid."

B. The Present Controversy.

Petitioner Geldermann, Inc. is an Illinois commodity brokerage firm registered with the Commission as a futures commission merchant (fcm) pursuant to §4d(1) of the Act, 7 U.S.C. §6d(1). Most of its customers are large commercial and institutional interests such as grain exporters, millers, banks and savings and loan institutions, mutual funds, investment bankers, petroleum interests and metals dealers. Clearing membership (for which exchange membership is a precondition) in the major contract markets including the CBT is, as the district court found, App.

35, 43, an economic necessity for Geldermann and without it Geldermann could not remain in its business.[1] Among its commercial clientele was FSI Futures, a New York corporation, for whom it executed trades on the CBT.

In April, 1985 FSI and Geldermann arbitrated FSI's claim that Geldermann improperly filled an FSI order on the CBT. Shortly after the arbitrator ruled in FSI's favor, Geldermann notified FSI that it wished to terminate their relationship and requested that FSI make arrangements to transfer its open positions and cash balances to another clearing firm.

In May, 1985 FSI filed a new demand with the CBT for arbitration against Geldermann seeking money damages for three claims. The first claim was for commissions which Geldermann charged FSI in transferring FSI's open positions and cash balances to the other firm. FSI alleged that this charge breached an agreement Geldermann had made with it that the transfer would be effected without economic burden to FSI. The second claim was for interest

[1] This is so for a number of reasons. Exchange membership carries worldwide prestige and enables Geldermann through participation in exchange affairs to advance its customers' interests in a manner not possible without it. It gives access to the exchange floor and trading pits which is invaluable and to the exclusive sources of market influencing information demanded by Geldermann's large commercial customers. It also affords access to how that information is affecting the auction process, and through floor presence it enables Geldermann to effectuate execution of customer orders through hand signals with the timeliness required by commercial clientele particularly in the U.S. Treasury bond pit, the most actively traded commodity futures contract in the United States. Clearing membership enables Geldermann to offer competitive commission rates necessary to attract and retain substantial commercial customers and to serve as a clearing broker for other nonclearing fcms and introducing brokers, sources of business which for purely economic reasons would not otherwise be available to Geldermann. Clearing status also subjects Geldermann to constant exchange surveillance and discipline, a circumstance reassuring to significant commercial customers. App. 43-45.

on funds which FSI had to borrow because Geldermann allegedly failed to transfer FSI's cash balances on the date designated by FSI. The third claim was for interest allegedly due FSI as a result of Geldermann's late payment of the April arbitration award. None of the claims was alleged to constitute a violation of the Act, any Commission regulation or rule of the CBT.

Geldermann objected to this demand for arbitration on the grounds that the claims in issue were claims at common law, that under the Seventh Amendment Geldermann had a right to have them tried by a jury, and that under Article III, §1 of the Federal Constitution Geldermann had a right to have them tried in the district court. Realizing that the CBT, despite its opposition to the Rule, would be forced to discipline it and likely subject it to penalties and possible expulsion if it did not acquiesce in FSI's demand, Geldermann, following the prescription in *Board* and in the footnote to CBT Regulation 620.01B, filed the present suit to enjoin enforcement of the Rule.[2]

On December 30, 1986, the district court, ruling on cross motions for summary judgment, held that in compelling Geldermann to arbitrate FSI's claims the Rule violated Geldermann's rights under the Seventh Amendment, rights Geldermann had not waived; that Section 5a(11) did not require adoption of the Rule and hence the Constitutionality of Section 5a(11) need not be decided; and that because of its Seventh Amendment ruling, the court would not reach Geldermann's Article III claim although the claim appeared to be "a strong one".

The Seventh Circuit, having jurisdiction under 28 U.S.C. Section 1291, reversed. After upholding the Commission's view that in Section 5a(11) Congress intended to require exchange members to submit to customer-initiated arbitra-

[2] The district court had federal question jurisdiction.

tion proceedings, the court concluded that Geldermann's Article III claim was without merit because it had consented to the FSI arbitration and thereby waived Article III's personal guarantees and, further, the nonwaivable interests of Article III had not been threatened. Having held that Geldermann was not entitled to an Article III forum, the court found that the Seventh Amendment was not implicated.

Article III's personal guarantees had been waived, the court said, for several reasons: First, Geldermann had in its CBT membership agreement agreed to abide by all exchange rules to which in 1981, long after Geldermann had joined the exchange, the challenged arbitration Rule was added. Second, the membership agreement was not a contract of adhesion in light of Geldermann's large size. Third, under *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 87 L.Ed.2d 409 (1985), the fact that Geldermann could not continue in business without maintaining membership in the CBT "has no impact on the question of Geldermann's consent." Finally, Geldermann's voluntary participation in the earlier arbitration with FSI constituted consent to the subsequent arbitration under the decision in *Commodity Futures Trading Commission v. Schor*, ____ U.S. ____, 92 L.Ed.2d 675 (1986).

Likewise finding that the structural interests of Article III were not undermined by the Commission's interpretation of Section 5a(11), the court held that *Schor* sanctions a grant of adjudicatory power, even over common law claims, to a non judicial branch if the decision to invoke the forum is left to the complaining party; that Federal policy strongly favors arbitration; and lastly, that even if Section 5a(11) implicates Article III's structural interest in separation of powers it does not prevent the adjudication of state law claims by non Article III judges since under *Schor* a reparations judge may decide common law counterclaims to claims arising under the Act.

REASONS FOR GRANTING THE WRIT

Without correction of the holding that Geldermann must arbitrate FSI's claims, Congress will be free (1) to relegate the adjudication of *any* common law claim to a non-jury, non-judicial forum in contravention of the Seventh Amendment and Article III; (2) to condition on the relinquishment of Constitutional rights the pursuit of *any* government or govermentally regulated employment or, indeed, the enjoyment of privileges, licenses, franchises and the like; and (3) to thwart the judicial review of those rights which protects our tripartite form of government. This is so because the Court of Appeals has in its construction of Section 5a(11) of the Commodity Exchange Act permitted Congress to condition Geldermann's engagement in the commodity brokerage business on the sacrifice of its Seventh Amendment and Article III rights and there is no principled basis for restricting this judicial sanction to the facts of this case, the operation of Section 5a(11) or the particular Constitutional guarantees in issue.

I.

ABSENT A CONSTITUTIONALLY VALID WAIVER, GELDERMANN WAS ENTITLED UNDER THE SEVENTH AMENDMENT TO A JURY TRIAL OF FSI'S CLAIMS.

Because the Court of Appeals held that Geldermann was not entitled to an Article III forum, it found that the Seventh Amendment was "not implicated" by Congressional action compelling arbitration of common law claims. In fact, the Article III conclusion was wrong, *infra* at 17, and the Court should have addressed the Seventh

Amendment question. Had it done so, it would have found Section 5a(11) constitutionally infirm.[3]

The Seventh Amendment provides in relevant part:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . ."

Whether FSI's claims are "suits at common law" within the Seventh Amendment "depends upon the nature of the claim, the kinds of rights . . . [it] asserts and the type of relief . . . [it] requests." *Board, supra*, 704 F.2d at 932. See also *Tull v. United States*, ____ U.S. ____, 95 L.Ed. 2d 365, 373 (1987); *Ross v. Bernhard*, 396 U.S. 531 (1970).

If the rights asserted are "legal rights in contradistinction to . . . equitable rights", *Parsons v. Bedford*, 28 U.S. 432, 447 (1830), and entitle the claimant to a money judgment of the kind customarily granted by a court of law, *Dairy Queen v. Wood*, 369 U.S. 469, 477-478 (1962), the protections of the Seventh Amendment will attach. This is so even for rights and remedies "unheard of at common law", *Pernell v. Southall Realty*, 417 U.S. 363, 375 (1974); *cf. Tull v. United States, supra*, so long as they are "of the sort traditionally enforced" in an action at law. *Pernell v. Southall Realty, supra.*

The district court found and FSI and the Court of Appeals appear to concede that FSI's claims are of a traditionally legal character.[4] Plainly they "sound in contract,

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[3] Geldermann does not concede but for purposes of this petition assumes that Congress in Section 5a(11) intended to compel arbitration of the FSI common law claims in issue. This Court could avoid striking down the statute by a construction which limits its application to claims arising under the Act or the Commission's regulations. In that case, the Court would need only to void the Rule. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 U.S. 490 (1979).

[4] It is difficult to see how it could be argued otherwise. In its first claim, which sounds in contract, FSI alleges that by charg-

(Footnote continued on following page)

debt and conversion", App. 33, and by nature and type of relief sought would unquestionably be triable to a jury if FSI asserted them in the district court. The question

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[4] *continued*
ing full round-turn commissions Geldermann breached its agreement to avoid economic hardship to FSI upon transfer of positions.

> "Geldermann had explicitly assured FSI . . . that, in the event FSI was required to transfer open positions because of the unilateral action of Geldermann (e.g., an increase in the round-turn commissions charged by Geldermann), such transfer would be effected without economic hardship to FSI." FSI's Statement of Claim at 3.

The relief sought is, in FSI's words, purely "financial loss". Statement of Claim at 2. Such claims for money damages resulting from breach of contract are the paradigm of common law causes of actions subject to Seventh Amendment protection. See *Similar v. Conner*, 327 U.S. 221, 223 (1976); *Ross v. Bernhard*, 396 U.S. 531, 542-543 (1970); *Rogers v. Loether*, 467 F.2d 1110, 1118 (7th Cir. 1972), *aff'd sub nom., Curtis v. Loether*, 415 U.S. 189 (1974); *Atlas Roofing Co. v. Occupational Safety Commission*, 430 U.S. 442, 458 (1977); *Myers v. United States District Court*, 620 F.2d 741, 744 (9th Cir. 1980); *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728 (3rd Cir. 1967), *cert. denied*, 389 U.S. 857 (1967); 47 *Am.Jur.2d* Jury §43 (1969); 5 *Moore's Federal Practice*, ¶38.11[5] at 38-78 to 38-80 (2nd Ed. 1985); *cf., Dairy Queen v. Wood, supra*, 369 U.S. at 478.

The second claim sounds in contract, conversion, debt, and money had and received, averring that Geldermann did not effect transfer of FSI's cash balances until forty eight hours after transfer of its open positions requiring FSI to borrow funds at interest to cover margin calls pending transfer of the cash balances. Such claims are "unmistakeably actions of law triable to a jury". *Ross v. Bernhard, supra*, 396 U.S. at 533 (the Seventh Amendment entitled parties to a jury trial for conversion of personal property); *United States v. Jepson*, 90 F.Supp. 983, 986 (D.N.J. 1953) ("The right of trial jury in an action for debt still prevails whatever modern name may be applied to the action."); *Farmers-Peoples Bank v. United States*, 477 F.2d 752, 756 (6th Cir. 1973); *Prudential Oil Corp. v. Phillips Petroleum Co.*, 392 F.Supp. 1018, 1022 (S.D.N.Y. 1975); *Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co., Inc.*, 90 FRD 313, 323, 324 (E.D.N.Y. 1981); 5 *Moore's Federal Practice, supra*. Similarly, FSI's third claim sounds in assumpsit, debt, or money had and received in that it seeks damages for interest on an obligation Geldermann allegedly wrongfully delayed in paying. See Statement of Claim at 4.

therefore becomes whether common law claims concededly legal in nature seeking money judgments fall outside the protection of the Seventh Amendment merely because Congress directs that they be adjudicated in a non judicial forum.

It is true that courts have upheld statutes entrusting adjudication of disputes to non judicial tribunals. See e.g. *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Essary v. Chicago and North Western Transportation Co.*, 618 F.2d 13, 17 (7th Cir. 1980); *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980). It is, however, equally true that in each of these cases the rights in issue were wholly new, Congressionally fashioned causes of action, circumstances courts have stressed in approving the use of the non judicial forum. See *Atlas, supra*, 430 U.S. at 461 ("The Seventh Amendment is no bar to the creation of *new rights* or to their enforcement outside the regular courts of law".); *Jones & Laughlin, supra*, 301 U.S. at 48 ("The instant case . . . is one unknown to the common law. It is a *statutory proceeding*".); *Essary, supra*, 618 F.2d at 17 ("[T]he Railway Labor Act [dispute resolution] procedure [was] established by Congress for disposing of claims arising from a collective bargaining agreement . . ."); *Skidmore, supra*, 619 F.2d at 159 ("[T]he jury right does not extend to situations where Congress has seen fit to set up an administrative procedure for adjudication of disputes *arising out of statutorily created rights* . . . [T]he rights here at issue [under the Railway Labor Act] are *creatures of statute*."); see also *Myron v. Hauser*, 673 F.2d 994, 1001-1004 (8th Cir. 1982) (non-jury administrative determinations of violations of substantive rights created by the

Commodity Exchange Act);[5] *cf. Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978). While these cases confirm "Congressional power to entrust enforcement of statutory rights", *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (emphasis added), to an administrative agency, they do not empower Congress to relegate to non-jury tribunals adjudication of non-statutory, common law rights. As this Court said in *Atlas*, in answer to concern that "Congress could utterly destroy the right to a jury trial by always providing for administrative rather than judicial resolution of the vast range of cases that now arise in the courts":

> "Our prior cases support administrative factfinding in only those situations involving 'public rights', e.g., where the Government is involved in its sovereign capacity under an otherwise valid *statute creating enforceable public rights*. Wholly private tort, contract, and property cases are not at all implicated." *Atlas Roofing Co. v. Occupational Safety & Health Review Commission, supra*, 430 U.S. at 458.

The present case falls squarely within the caveat in *Atlas*. FSI does not assert rights created under the Act,[6] see e.g. *Myron v. Hauser, supra*, Commission regulations or even

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[5] *Block v. Hirsh*, 256 U.S. 135 (1921), does not aid the Commission's argument. There the court sustained a war-time statutory scheme temporarily suspending landlords' legal remedy of ejectment for which there was a right to trial by jury. The statute altered the terms of the landlord-tenant relationship and relegated the parties to a non-jury administrative forum for enforcement of the newly defined rights. No such circumstances are presented here. Congress has not suspended or abrogated the common law rights in issue nor undertaken to create any new substantive right, the adjudication of which is to occur in an administrative agency. In Section 5a(11) Congress has done no more than designate an additional forum for vindicating rights given elsewhere in the Act. See *Rosenthal & Co. v. CFTC*, 614 F.2d 1121, 1123 (7th Cir. 1980).

[6] Regulation 620.01(B) merely establishes a forum in which to litigate. See *Ames v. Merrill, Lynch*, 567 F.2d 1174, 1180 (2d Cir. 1977) ("Arbitration is a form of procedure, not of substantive law.")

CBT rules. It does not seek enforcement of rights which have been "federalized" in order to advance the general purposes of the Act, see Section 3 of the Act, 7 U.S.C. §5, or the specific purposes of Section 5a(11). Rather FSI asserts only traditional, garden variety common law theories of *indebitatus assumpsit* and trespass on the case. And were the arbitrators empanelled under the Commission's regulations to consider those causes of action, they must, in Illinois, give judgment by applying "[t]he common law of England . . . prior to the fourth year of James the First . . ." *Ill.Rev.Stat.* ch. 1, ¶801 (1985). Through its mandatory arbitration rule and stance in this case the Commission (or Congress) would thus force Geldermann to litigate common law rights in a non-jury forum. This is precisely what the Seventh Amendment forbids. If Geldermann's right to a jury determination of such traditional rights in the present case can be avoided merely by agency relegation of their enforcement to a non-jury forum, then the protections of the Seventh Amendment would be entirely illusory because Congress or federal agencies under the guise of rulemaking could handily defeat jury demands in the assertion of common law rights merely by requiring compulsory arbitration or some other form of agency adjudication.

Artificially classifying FSI's complaints within CBT Regulation 603.01(B)'s definition[7] of "claims and grievances" only underscores the impermissible reach given by the Court of Appeals to the Regulation.[8] On their face FSI's

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[7] That definition, modeled after Commission Regulation 180.1(a), 17 C.F.R. §180.1(a), embraces:

> "any dispute which arises out of any transaction on or subject to the rules of the [CBT] . . . executed by or effected through a member of the [CBT] . . ."

[8] The Commission, see e.g. 41 *Fed. Reg.* 27520, 27526 (July 2, 1976), and some courts suggest that the definition includes not only violations of the Act and Commission regulations, *Smoky Greenhaw Cotton*

(Footnote continued on following page)

disputes do not relate to exchange transactions or to trades executed by or through Geldermann. The first dispute concerns a charge made by Geldermann for a bookkeeping entry by which Geldermann transferred FSI's commodity and cash positions to another CBT clearing member. The transfer did not involve a trade and had no effect on price discovery, open interest, market activity or the hedging of commodities in interstate commerce. Whether Geldermann did or did not have an agreement to make the transfer without charge to FSI simply does not implicate matters at which the arbitration rule was targeted. See 41 *Fed. Reg.* 27520 (July 2, 1976); see also *Shearson Hayden Stone, Inc. v. Scrivener*, 671 F.2d 680, 684 (2nd Cir. 1982) ("the term 'transaction' [in Regulation 180.1(a)] refers to trading rather than . . . procedural technicalities"). Whether Geldermann owed FSI interest in connection with the timing of the transfer of FSI's cash balances or payment on a prior arbitration award is even more remote from matters in which the Commission has legitimate regulatory oversight. Neither issue in any direct or reasonably apparent manner affects trading, pricing, hedging or the integrity of the futures market any more than would a dispute between Geldermann and FSI about interest due on an inter-company loan. That Congress is forcing Geldermann to arbitrate here despite the facial lack of relationship of FSI's claims to the concerns of the Act leaves little doubt that Congress (or, as seems apparent, the Commission) wishes less to discharge its legislative and regulatory responsibility than to aggrandize its jurisdiction at the expense of the judicial power and the rights of member litigants.

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[8] *continued*
v. Merrill, Lynch, 720 F.2d 1446, 1449-50 (5th Cir. 1983), but also certain non-Act claims such as violations of select exchange rules. *Felkner v. Dean Witter Reynolds, Inc.*, 800 F.2d 1466, 1468-6 (9th Cir. 1986). Whatever may be the constitutional limits on the types of non-Act claims the Commission may bring within CBT Regulation 603.01(B), they have been exceeded here.

Nor is it a defense to the statute's constitutional infirmity under the Seventh Amendment to suggest that compulsory arbitration proceedings under Regulation 620.01(B) necessarily involve only "public" rights whose adjudication may be accomplished without a jury. Whatever may be the contours of the "public" rights exception to the Seventh Amendment, it is clear that the inquiry about public rights arises if at all only when newly created substantive rights are involved. Here FSI seeks relief on theories of recovery that undeniably existed long before the Seventh Amendment's adoption and were at that time triable to a jury as a matter of right. Even if these claims had been disguised in FSI's Statement of Claim, "the choice of words used", *Dairy Queen v. Wood, supra,* 369 U.S. at 478, would have been immaterial since their essential common law character is undeniable. The challenged regulation did not create these common law substantive rights; it purports only to specify a non-jury procedure by which to enforce them. This it cannot do constitutionally.

II.

ABSENT A CONSTITUTIONALLY VALID WAIVER, GELDERMANN WAS ENTITLED TO TRY FSI'S CLAIMS IN AN ARTICLE III FORUM.

Because the Court of Appeals held that Geldermann waived its rights under Article III, it found that mandatory arbitration of FSI's common law claims did not abridge either the personal guarantees or the non-waivable interests of Article III. In fact, the waiver conclusion was wrong. *Infra* at 22. Had the Court of Appeals made a proper Article III inquiry it would have found Section 5a(11) constitutionally infirm.

Article III, Section 1 of the Federal Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior

Courts as the Congress may from time to time ordain and establish." The "inexorable command", *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982), of this provision is that the federal judicial power must possess the attributes prescribed in Article III, Section 1 which are:

> "The Judges, both of the supreme and inferior Court, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, Compensation, which shall not be diminished during their continuance in Office."

A. Article III's Personal Guarantees.

Commodity Futures Trading Commission v. Schor, ____ U.S. ____, 92 L.Ed.2d 675 (1986), teaches that the first of two interests Article III protects is a litigant's personal right to have claims decided before judges who are free from potential domination by other branches of the government. *Id.* at 691. While this Court has had "little occasion to discuss the nature or significance of this . . . safeguard", *id.* at 691, there seems little doubt that protection from domination requires, at a minimum, that the adjudicator possess the life tenure and undiminished salary attributes specified in Article III. Since arbitrators appointed under the CBT Rule do not, the only question is whether the claims in issue fall within the province of Article III. If they do, the mandatory arbitration rule as applied in this case clearly denies Geldermann's personal guarantees.

The "claims" to which this right attaches have been characterized by this Court variously as "[private]-rights", *Northern* at 70, "state-created" rights, *id.* at 71, and rights for which the state has "provided the rule of decision as between the parties litigating the dispute". *Thomas v. Union Carbide Agricultural Products Co., supra*, 473 U.S. at 597. In the present case this Court need not syn-

thesize these concepts perfectly or revisit the thorny "public right/private rights dichotomy", *id.* at 586, for no case "has gone so far" as to sanction a Congressional effort to commandeer from Article III courts "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Northern*, *id.* at 90 (Rehnquist, J., concurring). Since the present claims, no matter how labeled, are of that nature, absent waiver, a construction of Section 5a(11) which requires Geldermann to arbitrate them abridges its personal rights under Article III.[9]

B. Non-Waivable Article III Interests.

Section 5a(11) also offends the structural interests protected by Article III for it passes muster under none of the structural factors *Schor* enunciates.

The first factor is the extent to which the essential attributes of judicial power are reserved to Article III courts, and conversely the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts." *Id.* at 693. It is undeniable that if claims like FSI's can be forced to arbitration, the scope of jurisdiction removed from the courts and given to the arbitrators is almost unbounded; and the class of claims transferred would be necessarily and impermissibly broad like the class improperly transferred in *Northern*.

The second factor is "the origins and importance of the right to be adjudicated." FSI's claims and the additional types of causes of action cognizable in exchange arbitration as a result of recognizing FSI's claims as proper candidates for compulsory arbitration with but few exceptions find their origins in the common law and constitute the

[9] If the statute denies the personal guarantees of Article III, this Court's inquiry is at an end.

legal theories by which, through the courts, the people since the inception of English law have protected themselves and been compensated for damages sustained. They are, therefore, claims of the kind "assumed to be at the 'core' of matters reserved to Article III courts", *Schor* at 694. The propriety of their removal from the court's jurisdiction is especially suspect and the risk that Congress in ordering this removal "may improperly have encroached on the federal judiciary is obviously magnified." *Id.* at 695.

The third factor—the concerns that drove Congress to depart from the requirements of Article III—likewise fails to redeem Section 5a(11). In *Schor* this Court determined that the purpose of Congress in providing a simplified, efficient forum for adjudicating customer claims under the Act and Commission regulations would be frustrated unless brokers might assert related common law counterclaims in the same forum. The Court reasoned that in the absence of that counterclaim jurisdiction, brokers would file their claims in the courts and this might have the effect of forcing customers to transfer their reparations claims there to avoid the cost of litigating in two places at once. No such danger is present here because FSI is not asserting any claim under the Act or Commission regulations. Hence the concerns of Congress do not require that arbitrators have jurisdiction over FSI's common law claims. Of course *Schor* does not hold that a broker *must* file its own claims in reparations and accordingly *Schor* no more necessarily eliminates the potential for double litigation than does the Court of Appeals' construction of Section 5a(11).

Ignoring these circumstances, the Court of Appeals found Article III's structural concerns uncompromised because, it observed, Section 5a(11) leaves the decision to arbitrate to the complaining customer, federal policy favors arbitration and, regardless of the constitutionality of Section

5a(11), customers can remove "commodity cases . . . including state law counterclaims" from the reach of an Article III forum by invoking their reparations remedy. This reasoning is flawed.

Schor approved agency adjudication of related common law counterclaims because the party raising the constitutional objection in that case, i.e. the customer, had, as the complainant, been the one who possessed and exercised the option of invoking the reparations forum. On the other hand, under Section 5a(11) as the Court of Appeals has construed it, the litigant asserting the Article III concern is *denied* the option as to whether or not common law claims will be arbitrated. Hence the circumstances thought to favor constitutionality in *Schor* disfavor constitutionality here. Current favor for arbitration is likewise no grounds for weakening constitutional protections or assaulting the integrity of the courts and any thought to the contrary would, if accepted, leave the continued vitality of the Judicial Branch in serious doubt. Finally, while it is true that a commodity customer can force a broker to litigate "commodities cases" in reparations, those cases must involve violations of the Act or Commission regulations promulgated under the Act. FSI's claims do not. Moreover, reparations courts may entertain common law counterclaims only if "related" to the statutory claims and only if the defending broker elects to assert them there rather than in the courts. Here, because Geldermann wishes to litigate FSI's common law disputes in the courts, the reparations analogy fails.

The Court of Appeals' structrual analysis is also flawed because it misapprehends the final factor weighed in *Schor*—the question of whether consent to non-judicial adjudication has been given. Where it has not, Article III's personal guarantees will have been denied and so no structural inquiry need be made. Where it has, the likelihood of "impermissible incursions on the separation of powers",

Schor at 695, is greatly diminished in that in most cases nothing more will be involved than a decision by "willing parties . . . at their option", *id.*, to resolve their differences and no issue of governmental branches vying for power will arise. For reasons which follow, the Court of Appeals committed grave error in holding that Geldermann gave consent.

III.

CONGRESS MAY NOT CONSTITUTIONALLY CONDITION A COMMODITY BROKER'S PURSUIT OF ITS BUSINESS ON ITS "CONSENT" TO MANDATORY ARBITRATION OF COMMON LAW CLAIMS.

The Court of Appeals concluded that Geldermann waived any rights it may have under the Seventh Amendment and Article III by virtue of its voluntary election to continue membership in the CBT and thereby accept the CBT's mandatory arbitration Rule. The court is wrong. Geldermann did not freely agree to abide by that Rule and any conclusion to the contrary will result not only in the loss of those rights by Geldermann but, more importantly, a dangerous inbalance in our tripartite system of government through the establishment of a principle by which Congress, without judicial interference, can systematically eviscerate the full array of individual rights.

Since Geldermann cannot attract, service or retain its clientele without CBT clearing privileges for which exchange membership is a precondition, Section 5a(11), by compelling contract market members to arbitrate customer-initiated claims of the nature presented here, has put Geldermann to the choice of agreeing to mandatory arbitration of common law claims or going out of business. Therefore, the consent issue here is whether Congress may constitutionally do this or, put differently, whether Geldermann's apparent waiver of its Seventh Amendment and Article III rights is ineffective because of constitutional considerations.

This Court has long held that "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

> "Engaging in interstate commerce is one. *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 . . . Resort to the federal courts in diversity of citizenship cases is another. *Terral v. Burke Constr. Co.*, 257 U.S. 529 . . . Assertion of a First Amendment right is still another. *Lovell v. City of Griffin*, 303 U.S. 444 . . . ; *Murdock v. Pennsylvania*, 319 U.S. 105 . . . ; *Thomas v. Collins*, 323 U.S. 516 . . . ; *Lamont v. Postmaster General*, 381 U.S. 301. . . ."

The right to practice a profession, serve as a police officer or hold employment as a school teacher without being forced to relinquish the Fifth Amendment right against self-incrimination is yet another, *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Slochower v. Board of Education*, 350 U.S. 551 (1956), as is the right to receive unemployment benefits without having to sacrifice the freedom to practice religion. *Hobbie v. Unemployment Appeals Commission*, ____ U.S. ____, 94 L.Ed.2d 190 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963). Similarly, lower courts have said "a search otherwise unreasonable [under the Fourth Amendment] cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment." *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 943 (D.C. Cir. 1987); see also, *McDonell v. Hunter*, 809 F.2d 1302, 1310 (8th Cir. 1987). Moreover, the fact that one initially consents, expressly or impliedly, to an unconstitutional condition does not preclude later challenge. *Abie State Bank v. Byran*, 282 U.S. 765, 776 (1931); *Union Pacific R.R. Co. v. Public Service Commission*, 248 U.S. 67, 70 (1918) (Holmes, J.); *Garrity v. New Jersey, supra.*

This Court has been especially intolerant of legislation which seeks through economic compulsion to force relin-

quishment of a constitutional right. Thus, in *Frost v. Railroad Commission*, 271 U.S. 583 (1926), it said of a California statute which undertook to force private carriers to assume the burdens of common carriers as a condition of using the highways:

> "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forgo a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.
>
> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizens of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens to withhold. . . . [*The government*] *may not impose conditions which require the relinquishment of constitutional rights.*" *Id.* at 593 (emphasis added).

Similar reasoning was voiced in *Union Pacific R.R. Co. v. Public Service Commission, supra*, in which a railroad, having paid under protest a fee to the state Public Service Commission for a certificate of authority to issue bonds, was confronted with the contention that it could not object to the constitutionality of the fee because its application for the certificate had been "voluntary".

> "Were [the federal courts precluded from examining the question of waiver], as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than in case of a failure to accept it, and then to declare the acceptance voluntary. . . .
>
> On the facts we have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a *commercial necessity*. . . . Of course, it was for the interest of the company to get the certificate. It is always in the

> interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is characteristic of duress so called." 248 U.S. at 70-71 (emphasis added).

Cf. Overmeyer Co. v. Frick Co., 405 U.S. 174, 188 (1972) (the sufficiency of a waiver will be in doubt where there is "great disparity in bargaining power"); *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (waiver will be suspect where the claimed waiver language is part of a form document and "a necessary condition" of the transaction or where "[t]here has been no bargaining over the contractual terms" constituting the supposed waiver); *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 756 (6th Cir. 1985); *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977).

Manifestly, Section 5a(11) violates these principles. Exchange membership for Geldermann is a "commercial necessity", *Union Pacific, supra* at 71, and Congress was no more free to condition it on relinquishment of its Seventh Amendment and Article III rights than was the regulator free in *Spevack v. Klein, supra* to condition the practice of law on relinquishment of an attorney's Fifth Amendment rights or was the government free in *Union Pacific* to condition a railroad's authority to borrow on payment of an otherwise unconstitutional fee or in *Terral* to condition the franchise to do business on release of a corporation's right to use the federal courts. Under these circumstances, Geldermann's continued membership in the CBT after insertion of the mandatory arbitration rule in the CBT rulebook was a choice between "the rock and the whirlpool", between its "livelihood" and loss of constitutional protections. That Geldermann chose continued membership "according to interest" exemplifies rather than excludes duress. In light of these principles, it is clear the Court of Appeals erred in finding that Geldermann waived its Seventh Amendment and Article III rights.

Even limited acceptance of this error poses grave jeopardy to a host of individual freedoms and loss of judicial protection against governmental abuse. For if this Court is powerless to prevent Congress from conditioning a broker's ability to do business on relinquishment of rights under the Seventh Amendment and Article III, what is to stop Congress—in the name of efficient regulation—from conditioning the practice of accountancy on an agreement that state boards of examiners may conduct warrantless searches of work papers; or from conditioning employment by a public body on an agreement not to invoke the Fifth Amendment protection against self-incrimination; or from conditioning membership in the National Futures Association (a necessity for all members of the futures industry) on an undertaking not to require reasonable procedural protections in any proceeding to terminate membership? What was said by Mr. Justice Sutherland more than sixty years ago remains true today: "[i]f the state may compel the surrender of *one* constitutional right as a condition of its favor, it may, in like manner, compel the surrender of *all.*" *Frost v. Railroad Commission, supra* at 594 (emphasis added).

Disregarding these principles, the Court of Appeals found waiver for other reasons which simply do not hold water. First, the court rejected a characterization of the Rule as a contract of adhesion negating waiver because Geldermann "is reputed to be the largest commodity broker in the United States". Geldermann's size is irrelevant. The party on the other side of the table was the United States Government, acting through the Commodity Futures Trading Commission, which by regulatory fiat had commanded the CBT to insert the objectionable rule into the membership contract. It was not merely a case of "great disparity of bargaining power", *Overmeyer Co. v. Frick, supra*, a condition which itself would have been inconsistent with genuine waiver. There was in fact no bargaining at all. *Fuentes v. Shevin, supra.*

The Court of Appeals was also wrong in holding that under *Thomas v. Union Carbide Agricultural Products Co., supra,* "economic compulsion" has no impact on consent. *Thomas* involved a pesticide registrant's claim that under Article III it had a right to a district court determination of the amount of compensation due it for use of its research data by a follow-on registrant. A federal statute permitted that use but provided that the amount of payment should be determined by arbitration. The initial registrant contended that the statutory scheme forced it "to choose between relinquishment of any right to compensation from a follow-on registrant or engaging in an unconstitutional adjudication". *Id.* at 420. The Court rejected the argument. The initial registrant had "no property interest under state law" in its data once disclosed, *id.* at 422, so that the right to compensation arose solely by virtue of the federal statute. Because it is thus "federal law [which] supplies the rule of decision", *id.*, the Court concluded that enforcement of the right was not one encompassed by Article III and the initial registrant therefore had not been subjected to an unconstitutional choice. The present case is opposite: Section 5a(11) forces Geldermann to choose between arbitration of a common law right clearly within the compass of the Seventh Amendment and Article III or going out of business. This "price", *Garrity v. New Jersey, supra,* 385 U.S. at 500, Congress may not exact.

The court below also erred in supposing that cases involving efforts by members of the National Association of Securities Dealers to escape New York Stock Exchange arbitration "have uniformly rejected" Geldermann's waiver arguments in this case. In *Patten Securities v. Diamond Greyhound & Genetics,* 819 F.2d 400 (3rd Cir. 1987), an NASD member sought to avoid a customer's demand for arbitration under an NASD membership rule which provided that members agree to abide by association rules.

Those rules included a Code of Arbitration requiring arbitration of "any dispute . . . arising out of . . . the business of any member . . . between members and public customers. . . ." *Id.* at 402. The member made no claim that Congress or the NYSE had unconstitutionally imposed the arbitration requirement or that it had any objection to the Code or that requiring it to arbitrate the matters in issue abridged any rights under Article III, the Seventh Amendment or any other constitutional protection or that it had acceded unwillingly to the mandatory arbitration rule out of economic necessity. Rather, the member contended only that the customer was not a "public" customer within the meaning of the Code and that even if it were, it had waived its right to arbitrate by signing a forum selection clause. The Third Circuit therefore had no occasion even to consider much less reject the issues raised by Geldermann now. The other NASD cases relied on by the court below are to the same effect. See *PaineWebber v. Chase Manhattan*, 728 F.2d 577 (2d Cir. 1984); *Merrill Lynch v. Hovey*, 726 F.2d 1286 (2d Cir. 1984); *Coenen v. R.W. Pressprich*, 453 F.2d 1209 (2d Cir. 1972); and *Axelrod & Co. v. Kordich, Victor & Neufeld*, 451 F.2d 838 (2d Cir. 1971). Notably, *Pearce v. E.F. Hutton, Inc.*, 828 F.2d 833 (D.C. Cir. 1987), intimates that NASD's mandatory arbitration rule is by no means invulnerable to constitutional challenge, at least to the extent it brings certain common law claims within its reach:

> "I have misgivings about a 'boiler plate' arbitration clause which requires an applicant, as a pre-condition of employment in an extensive specialized industry, to waive his Seventh Amendment right to a jury trial in a common law defamation case and privacy suit such as is before us now.
>
> * * * * *
>
> However, the plaintiff here raised no constitutional question. Nor did he invoke the principles relating

> to enforceability of disadvantageous contracts resulting from 'overwhelming economic power.' " *Id.* at 834.

In the present case Geldermann makes the constitutional challenge and so does the exchange itself.[10]

Finally, the Court of Appeals erred in concluding that Geldermann's earlier arbitration with FSI over the propriety of a fill on an order on the exchange floor waived its right to assert a constitutional objection to any subsequent arbitration request. Under this thinking, the exchange itself and every exchange member who has participated in an arbitration under the Rule since the Commission forced its promulgation has waived its right to object to it. Indeed, adherence to this novel proposition would mean that sufferance by a citizen of any instance of constitutional infringement would forever preclude the ability to make future protest. Such a principle would promote unnecessary litigation and frustrate federal policy favoring amicable settlement of disputes and plainly does not represent a correct statement of law.

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[10] The Court of Appeals observation that Geldermann could have preserved its right to challenge the Rule "by resigning its membership in the CBOT" seems almost facetious. Had Geldermann resigned, it would not have had FSI as a customer and the present claims would never have arisen. Moreover, if the CBT lacked standing to challenge the Rule in the absence of a specific controversy, see *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, *supra*, it is difficult to see how Geldermann would have standing to challenge the Rule when, by virtue of the resignation from the exchange, it was no longer subject to the Rule and hence its customers could not invoke it. It would appear that the Seventh Circuit in ostensibly prescribing a fail-safe procedure in *Board* for attacking the Rule was in fact laying a trap through which completely to insulate the Rule from attack. The mischievious constitutional implications of such a proposition are far reaching and unacceptable.

Schor is not contrary. There a commodity customer filed a claim in reparations under Section 14 of the Act, then filed *the same claim* as a counterclaim to its broker's action in the district court, and later by agreement had the entire dispute adjudicated in the reparations forum. Under the circumstances, this Court did not hesitate to find that the customer had waived its right to an Article III forum. Here there has been no consolidation of the first and second FSI arbitration demands. On the contrary, the first arbitration has been concluded and the common law claims FSI now asserts present matters different from those considered in the earlier proceeding. And, importantly, unlike the customer in *Schor* Geldermann has never sought to have the later claims at issue adjudicated by arbitrators.

CONCLUSION

For the reasons given, the writ should issue as requested.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-1312

GELDERMANN, INC.,

Plaintiff-Appellee,

and

BOARD OF TRADE OF THE CITY OF CHICAGO,

Intervening-Appellee,

v.

COMMODITY FUTURES TRADING COMMISSION,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 07350—**James F. Holderman,** *Judge.*

ARGUED SEPTEMBER 18, 1987—DECIDED DECEMBER 22, 1987

Before BAUER, *Chief Judge,* CUMMINGS and POSNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* The question presented by this appeal is whether the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. § 1 *et seq.*, dictates that the Commodity Futures Trading Commission ("CFTC" or "Commission") promulgate rules requiring commodity exchange members to submit to customer-initiated arbitration, and, if so, whether such a requirement violates Ar-

ticle III of the United States Constitution or the Seventh Amendment. We hold that Congress, through the CEA, intended to require mandatory submission to customer-initiated arbitration and that this requirement does not violate Article III or implicate the Seventh Amendment.

I. *Commodity Exchange Act Requires Arbitration of Claims of Customer Seeking That Remedy.*

Although this case arises in its current form between Geldermann, Inc. ("Geldermann"), a commodity brokerage firm, and the CFTC, it is the latest action in the ongoing dispute between the Chicago Board of Trade ("CBOT") and the CFTC regarding the mandatory submission of CBOT members to customer-initiated arbitration proceedings.[1] In fact, the CBOT raised precisely the same issue before this Court in *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, 704 F.2d 929 (7th Cir. 1983) (hereinafter "*CBOT v. CFTC*"). At that time, however, we determined that the issue was not yet ripe for adjudication and declined to reach the constitutionality of either Section 5a(11) of the CEA or CFTC Rule 7.201, *id.* at 932-935, both of which the CFTC interprets as mandating arbitration on customer demand. In dictum, this Court went on to say:

> the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid.

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[1] The defendants below were the CBOT, the CFTC and FSI Futures, Inc. The CBOT continues its dispute with the CFTC over this regulation by joining on appeal as the intervening-appellee, filing its own brief and participating with Geldermann on oral argument.

Id. at 933; this text was repeated in the footnote to CBOT Regulation 620.01(B), *infra* at 8. Geldermann is a CBOT member seeking to enjoin arbitration of claims filed against it by its former customer, FSI Futures, Inc. ("FSI"). Geldermann's complaint now requires us to consider the constitutionality of the Act, the CFTC Rule and the CBOT Regulation which mandate arbitration.

The CEA broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions. In 1974, Congress "overhaul[ed] 'the Act in order to institute a more comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.' " *Commodity Futures Trading Commission v. Schor*, 106 S. Ct. 3245, 3250 (quoting H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. at 1 (1974)). To implement this new structure, Congress created the CFTC as an independent agency vested with sweeping authority to adopt any rules that in its judgment are necessary to effectuate the purposes of the Act. 7 U.S.C. § 12a(5) (1974). See generally *Schor*, 106 S. Ct. at 3250; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 365-366.

As part of the 1974 amendments to the Act, Congress passed Section 5a(11) which required a contract market such as the CBOT[2] to:

> Provide a fair and equitable procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof: *Provided*, that (i) the use of such procedure by a customer shall be voluntary and (ii) the procedure shall not be applicable to any claim in excess of $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties, and (iv) the term "customer" as used in this paragraph shall not include a futures commission merchant or floor broker. . . .

7 U.S.C. § 7a(11) (1974).

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[2] Pursuant to Section 5 of the Act, 7 U.S.C. § 7, the CBOT was designated by the Commission as a contract market.

To effectuate the provisions of Section 5a(11), in 1976 the Commission adopted regulations governing the administration of contract markets' customer grievances. The regulations required every contract market to "adopt rules which provide for a fair and equitable procedure through arbitration or otherwise for the settlement of customer's claims and grievances against any member" and set forth minimum requirements to be followed by a contract market when adopting such a procedure. 17 C.F.R. § 180.2 (1976). The Commission believed, as it still does, that its regulations require a contract market "to provide a procedure where the member must arbitrate when called upon to do so." 46 Fed. Reg. 57457, 57461 (Nov. 24, 1981). Further, it believed that Congress intended to compel arbitration upon customer request when it enacted Section 5a(11), 46 Fed. Reg. at 57458, and that a mandatory customer-initiated arbitration rule was necessary to effectuate the purposes underlying Section 5a(11). 46 Fed. Reg. 3027, 3028 (Jan. 13, 1981); accord *CBOT v. CFTC*, 704 F.2d at 934. As the Commission later stated when its interpretation was challenged by the CBOT, "[t]hese requirements would be meaningless and of no effect if exchanges did not require contract market members to participate in arbitration proceedings initiated by customers." 46 Fed. Reg. at 3028.

In accordance with the Commission's interpretation of Section 5a(11), ten of the eleven contract markets submitted arbitration rules which required their members to participate in arbitration proceedings initiated by customers; the Commission approved all of these rules. 46 Fed. Reg. at 3028 n.5. The one exception was the CBOT. The CBOT took the position that Section 5a(11), as implemented under 17 C.F.R. Part 180,[3] did not require members of the exchange to submit to the arbitration of claims when a customer initiates such a proceeding. *Id.* In direct opposition to the Commission, the CBOT pro-

[3] Part 180 of the CFTC's regulations covers arbitration or other dispute settlement procedures.

posed regulations that permitted members of that exchange or its employees to refuse to participate in arbitration proceedings initiated by customers. 46 Fed. Reg. at 3028.

The Commission advised the CBOT that Congress did not intend to allow members the option of refusing to participate in exchange arbitration proceedings and requested that the CBOT amend its rules accordingly. *Id.* When the CBOT refused, the Commission, acting pursuant to its authority under Section 8a(7) of the Act, altered proposed CBOT Regulation 620.01(B) to conform to the Commission's interpretation of Section 5a(11) and adopted Rule 7.201 to reflect the alteration. 46 Fed. Reg. at 57463-57464.[4]

One month later, on December 24, 1981, the CBOT filed suit in the United States District Court for the Northern District of Illinois seeking both a permanent injunction to restrain the CFTC from enforcing Rule 7.201 and a declaratory judgment that the Rule, due to its preclusion of the right to a jury trial, violated the Seventh Amendment. *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, No. 81 C 7175, slip op. (N.D. Ill. April 23, 1982). The district court found that, contrary to the Commission's interpretation, Section 5a(11) did not require the CFTC to adopt rules mandating participation by contract market members in customer-initiated arbitration proceedings. *Id.* at 7. Because the district court deter-

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[4] Rule 7.201 stated in relevant part:

> *Customers' Claims and Grievances.* The Arbitration Committee and Mixed Panels constituted pursuant to Regulation 620.02 have jurisdiction to arbitrate all customers' claims and grievances not in excess of $15,000 against any member or employee thereof which have arisen prior to the date the customer's claim is asserted. If the customer elects to initiate an arbitration proceeding of any customer claim or grievance, *the member shall submit to arbitration* in accordance with these Arbitration Rules and Regulations.

17 C.F.R. § 7.201, Regulation 620.02(B) (1981) (emphasis added).

mined that the challenged arbitration requirement was imposed by the CFTC without direction by Congress to do so, it considered the constitutionality of CFTC Rule 7.201, but not of CEA Section 5a(11). The court held that Rule 7.201 violated the Seventh Amendment and permanently enjoined the CFTC from enforcing Rule 7.201 against the CBOT, its members and their employees. *Id.* The Commission appealed that decision to this Court, but before we decided the appeal, Congress amended Section 5a(11). See 704 F.2d at 934-935.

Congress' amendment repealed the language relating to compulsory payments, eliminated the $15,000 ceiling on claims subject to arbitration, and broadened the definition of customer.[5] Neither the effect of nor the intent behind these amendments was to reject the CFTC's interpretation of the Section. During the 1982 re-authorization process, Philip Johnson, the Chairman of the CFTC, expressly informed Congress of both the Commission's interpretation of Section 5a(11) and the 1982 conflicting opinion of the district court in *CBOT v. CFTC. Commodity Futures Trading Commission Reauthorization: Hearings before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 97th Cong., 2d Sess. 67 (1982) ("1982 Senate Hearings").[6] Thus aware of the conflicting interpretations

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[5] As amended in 1982, Section 5a(11) read: contract markets shall

> Provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided*, That (i) the use of such procedure by a customer shall be voluntary and (ii) the term "customer" as used in this subsection shall not include another member of the contract market. . . .

7 U.S.C. § 7a(11) (1983).

[6] The Chairman stated that "the Commission has interpreted the contract market arbitration provisions of 5a(11) of the Act to require a member or employee of an exchange against whom a cus-

(Footnote continued on following page)

of the Commission and the district court, Congress expressly stated that the 1982 amendments "[do] not affect the existing requirement that the use of arbitration by the customer is voluntary or the *Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue.*" H.R. Rep. No. 565, 97th Cong., 2d Sess. 56 (1982) (emphasis added).

During this interim period, the CBOT's appeal in *CBOT v. CFTC* reached this Court. We did not reach the substantive issues involved, but reversed the lower court on ripeness grounds. *CBOT v. CFTC*, 704 F.2d at 932-933; see also *supra*, at 2. As a result, the CBOT was compelled to distribute Regulation 620.01(B), as altered by Commission Rule 7.201, to its members. The CBOT, however, added the following footnote in its rulebook:

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[6] *continued*

tomer has a claim to arbitrate that claim if the customer wishes to do so." 1982 Senate Hearings at 67. The Chairman further informed Congress that:

> [r]elying upon its interpretation of Section 5a(11) the Commission recently disapproved the rules of one contract market and required the [CBOT] exchange to adopt a rule that a member or employee of the contract market must arbitrate at the behest of the customer. You should be aware, however, that the exchange has taken the position that the Commission's interpretation unconstitutionally deprives the member or employee of his right to jury trial protected by the Seventh Amendment to the Constitution and has challenged the Commission's action affecting its rules. *Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, No. 81-C-7175 (McMillen, J.). Although the Commission argued that its interpretation was consistent with the language and purposes of Section 5a(11), the court agreed with the exchange and entered an order declaring the Commission's interpretation regarding the mandatory arbitration requirement to have violated the Seventh Amendment right to jury trial of members of the exchange.

Id.

> The following is the text of Regulation 620.01(B) as amended by CFTC Rule 7.201. The legality of Rule 7.201, and thus the obligation of Board of Trade members to arbitrate customer's claims and grievances, has been the subject of litigation between the Board of Trade and the CFTC. In 1982, the United States District Court for the Northern District of Illinois declared the Rule invalid, holding that CFTC Rule 7.201 is an unconstitutional denial of the right to a jury trial. However, on April 5, 1983, the Seventh Circuit Court of Appeals held that the case was not yet "ripe" for adjudication. While the Court did not rule on the merits, the Court went on to say: "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid."

Rules and Regulations, Board of Trade of the City of Chicago ("*CBOT Rules and Regulations*"), Regulation 620.01.

The CBOT took our dictum in *CBOT v. CFTC* literally and in the above-quoted footnote presented it verbatim as advice to members on how to challenge the rule. This case involves such a challenge. Geldermann, the plaintiff and a member of the CBOT, refused to arbitrate a customer-initiated claim by FSI under Regulation 620.01(B). The CBOT, despite its objections to the Regulation, is required by the CEA to enforce its rules. 7 U.S.C. § 7(a)(8). Failure to enforce its rules would subject the CBOT to a civil penalty and fines up to $100,000 and would subject CBOT officials to criminal prosecution and, upon conviction, fines and/or imprisonment. 7 U.S.C. § 13(a). Thus the CBOT attempted to force Geldermann to proceed with arbitration. Geldermann's continued refusal to submit to arbitration violated a regulation of the CBOT, the CEA and the CFTC rule. Each such violation subjected Geldermann to disciplinary proceedings. *CBOT Rules and Reg-*

ulations, Regulations 500.00 and 505.00. Geldermann was also subject to potential penalties which include fines, suspension and expulsion from the Exchange. *CBOT Rules and Regulations*, Regulation 560.00.

To forestall these severe consequences, Geldermann filed suit against the CBOT, CFTC and FSI in federal court seeking to enjoin the CBOT from requiring Geldermann to arbitrate its customer's claim. Geldermann challenged Section 5a(11) of the Act, Commission Rule 7.201 and CBOT Regulation 620.01(B) as violative of its constitutional rights under the Seventh Amendment and Article III.

Rejecting the Commission's interpretation of Section 5a(11), the district court concluded that Section 5a(11) of the CEA did not, in and of itself, require Geldermann to arbitrate its customers' claims; therefore, because the district court did not view the mandatory arbitration as congressionally imposed, the court did not consider the constitutionality of Section 5a(11). *Geldermann v. Board of Trade of the City of Chicago*, No. 85 C 07350, slip op. at 7 (N.D. Ill. Dec. 30, 1986). Instead, the district court considered the constitutionality of Rule 7.201 and Regulation 620.01(B) and held that each violated Geldermann's Seventh Amendment right to a jury trial. In dictum, the court indicated that the Rule and Regulation also appeared to violate Article III. *Id.* at 13. We disagree with this approach as well as the district court's ultimate holding regarding the constitutionality of CFTC Rule 7.201 and CBOT Regulation 620.01(B).

First, the district court erred by failing to accept the well established canon "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844; see also *Schor*, 106 S. Ct. at 3254; *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 380-381; *Blinzinger v. Lyng*, No. 86-2674, 86-2698, slip op. at 6 (7th Cir. Nov. 4, 1987). This principle directs courts to

give considerable weight to the CFTC's contemporaneous and consistently held position that Section 5a(11), in accord with its terminology, requires commodity exchange members to submit to customer-initiated arbitration. Instead, with no apparent deference to the statutory language or the CFTC's interpretation of the statutory scheme that it is entrusted to administer and without analysis of the legislative history of the Act, the district court simply concluded that Section 5a(11) "does not . . . require the CFTC to pass a mandatory arbitration regulation. The CFTC could have passed a regulation providing that arbitration could proceed only if both broker and customer agreed." *Geldermann*, No. 85 C 07350, slip op. at 7. This conclusory dismissal of the Commission's interpretation fails to adhere to the standard of deference enunciated by the Supreme Court in *Chevron*, 467 U.S. at 844.

Second, in addition to the language of Section 5a(11), an examination of the legislative history of the Act shows that deference to the CFTC's interpretation is especially warranted because Congress has twice amended the CEA since the CFTC declared by regulation its interpretation of Section 5a(11)[7] and has not overturned the CFTC's position. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Schor*, 106 S. Ct. at 3255 (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275).

Finally, to sustain the CFTC's interpretation there is no need to rely simply on canons of statutory construction or find tacit approval of the CFTC's position in congressional silence. When Congress amended the Act in 1978, it explicitly stated that it was not affecting "the

[7] Congress again amended the CEA in the Futures Trading Act of 1986 (100 Stat. 3556) without altering the CFTC's construction.

Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue." See *supra* at 6-7. At the time Congress made this statement in support of the Commission's interpretation, it was of course cognizant of the contrary interpretation asserted by the CBOT and adopted by the district court in *CBOT v. CFTC*. See *supra* at 6-7 n. 6.

In view of the abundant evidence that Congress intended to require exchange members to submit to customer-initiated arbitration proceedings, it is next necessary to address the question whether Section 5a(11) violates Article III.

II. *Article III of the Constitution Is Not Transgressed by Arbitration Here*

Article III, § 1 of the Constitution directs that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish . . ." and provides that these federal courts shall be staffed by judges who hold their offices during good behavior and whose compensation shall not be diminished during their tenure in office. Geldermann and the CBOT contend that Section 5a(11) of the CEA, CFTC Rule 7.201 and CBOT Regulation 620.01(B) all violate Article III insofar as they force Geldermann to submit to the resolution of customer claims against it by arbitrators who are not afforded the tenure and salary protections of Article III.

A. *Waiver of Article III's Personal Guarantees*

"Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate procedures by which civil and criminal matters must be tried." *Schor*, 106 S. Ct. at 3256. Therefore, the first question to consider is whether Geldermann waived its right to an Article III adjudication by consenting to submit to arbitration.

The district court found that Geldermann did not "knowingly, intentionally and voluntarily" waive its constitutional rights to an Article III forum and a jury trial. *Geldermann*, No. 85 C 07350, slip op. at 10, 13. However, both the facts of this case and the applicable law demonstrate that Geldermann did indeed consent to arbitration; therefore Geldermann cannot now complain that it is deprived of any claimed constitutional rights it might have had.

The district court rejected the evidence that Geldermann consented to arbitration because the court characterized the membership agreement between Geldermann and the CBOT as a contract of adhesion. It stated: "[w]here the parties to this contract the (CBT and Geldermann) are of such grossly unequal bargaining power, this court cannot consider Geldermann's agreement to the contract to be a 'voluntary' waiver of its constitutional rights." *Geldermann*, slip op. at 11. The court's finding that the parties were of "such grossly unequal bargaining power" is incredible in light of Geldermann's statement in its supporting affidavit that, measured by the customer balances it carries, Geldermann is reputed to be the largest commodity broker in the United States.

The district court also rejected the evidence of Geldermann's consent to arbitration because "[i]f it [Geldermann] was to continue in business, Geldermann had no choice but to accept the CBT's rules and regulations." *Id.* On this point, the court ignored the clear mandate of *Thomas v. Union Carbide Agricultural Products Co.*, 105 S. Ct. 3325, regarding what constitutes consent to arbitration procedures.

Thomas concerned the data-sharing provision of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 135 *et seq.* As a precondition to registration of a pesticide under FIFRA, manufacturers must submit research data to the Environmental Protection Agency ("EPA") concerning the product's health, safety and environmental effects. The 1972 Act established data-sharing provisions to streamline pesticide registration procedures,

to increase competition, and to avoid unnecessary duplication of data generation costs. These data-sharing provisions both authorized the Administrator of the EPA to use data submitted by prior registrants to support the registration of "me-too" or "follow-on" registrants and established a scheme for sharing the costs of data generation. *Thomas*, 105 S. Ct. at 3328. Congress viewed this data sharing as essential to the registration scheme, *id.* at 3329 (citing S. Rep. No. 95-334 at 7 (1977)), but the then current system, which required the EPA to determine the proper compensation when the data-generating and follow-on registrants could not agree on an amount, proved unworkable.

In response, Congress amended FIFRA in 1978. For those conflicts in which the data-generating and follow-on registrants could not agree on an amount of compensation, Congress replaced the system of EPA determination with mandatory arbitration.[8] Under the new system,

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[8] Under amended Section 3(c)(1)(D)(ii):

> . . . the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the "applicant") . . . only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator. . . . The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such an agreement, binding arbitration under this subparagraph. . . . If the Administrator determines that an original data submitter has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the original data submitter shall forfeit the right to compensation for the use of the data in support of the application. . . . *[I]f the Administrator determines that an applicant has failed to participate in a procedure for reaching an agreement or in an arbitration proceeding as required by this subparagraph, or failed to comply with*

(Footnote continued on following page)

any follow-on registrant who fails: (1) to agree on compensation with the data-generating registrant, (2) to participate in arbitration or, (3) refuses to comply with the terms of the agreement or arbitration decision, has its application denied or its registration canceled without further hearing. 7 U.S.C. § 136(a)(c)(1)(D)(ii).

If the EPA Administrator determines that an applicant has failed to participate in arbitration, the Administrator will deny the application or cancel the registration of the pesticide in support of which the data was used. If the follow-on registrant wants to enter or continue in business, it has no choice but to accept the EPA's rules and regulations, including the arbitration compensation scheme. Thus under FIFRA, an applicant has the option of participating in the arbitration scheme or going out of business. Yet despite this economic compulsion, the Supreme Court held that "the follow-on registrant . . . explicitly consents to have his rights determined by arbitration." *Thomas*, 105 S. Ct. at 3339. The Court found this explicit consent in the follow-on registrant's submission to the requirements of FIFRA Sections 3(c)(1)(D) and 3(c)(2)(D). *Id.* See 40 C.F.R. § 162.9-5(b) (1984).

In light of *Thomas*, the district court's finding that if Geldermann was to continue in business it had no choice but to accept the CBOT's rules and regulations has no impact on the question of Geldermann's consent to follow all of the rules of the CBOT, including the arbitration rules. Thus none of the district court's objections counter our holding that Geldermann consented to participate in customer-initiated arbitration proceedings.

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[8] *continued*
the terms of an agreement or arbitration decision concerning compensation under this subparagraph, the Administrator shall deny the application or cancel the registration of the pesticide in support of which the data were used without further hearing.
7 U.S.C. § 136(a)(c)(1)(D)(ii) (emphasis added).

The district court's objections aside, the facts of this case as well as the applicable law clearly establish that Geldermann did indeed consent to arbitration. Geldermann is a member of the CBOT, a body this Court has previously determined to be a "voluntary association." See *Rosee v. Board of Trade of the City of Chicago*, 311 F.2d 524, 525 (7th Cir. 1963). As a precondition of membership, Geldermann signed "a written agreement to observe and be bound by the Charter, Rules and Regulations of the Association, and all amendments subsequently made thereto." *CBOT Rules and Regulations*, Regulation 205.00.

Subsequent to Geldermann's signing of the agreement and its admission as a CBOT member, the CBOT amended its rules to include Regulation 620.01(B). By virtue of its prior agreement, Geldermann consented to observe and be bound by the terms of Regulation 620.01(B), which unambiguously require Geldermann to arbitrate customer-initiated claims. In addition, Regulation 601.00 expressly provides:

> Arbitration of Customers' Claims and Grievances—The Board shall by regulation establish procedures in conformity with Section 5a(11) of the Commodity Exchange Act and Regulations thereunder for the settlement through arbitration of customers' claims and grievances against members and their employees. Every member, *by becoming such*, agrees to abide by all regulations prescribed by the Board pursuant to this rule, and further agrees to abide by and perform any award made thereunder.

CBOT Rules and Regulations, Regulation 601.00 (emphasis added).

Yet Geldermann asserts that it never consented to be bound by this rule—that CBOT membership alone is not sufficient to constitute consent to arbitration and therefore cannot establish a waiver of its constitutional right to an Article III forum. A review of the relevant case law, however, indicates that similar arguments by members of the National Association of Securities Dealers ("NASD") and

the New York Stock Exchange ("NYSE") have been uniformly rejected.

In *Patten Securities Corp., Inc. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987), plaintiff Patten was a member of the NASD, and as such had agreed to " 'abide by, comply with, and adhere to the . . . By-laws, the rules and regulations of the [NASD] as they are or may from time to time be adopted, changed or amended. . . .' " *Id.* at 405 (quoting *NASD By-laws*, Art. III, Sec. 1(a)(1)). The NASD adopted a code of arbitration procedure which provided that any dispute " 'shall be arbitrated under this Code, as provided for by any duly executed and enforceable written agreement or upon the demand of a customer.' " *Id.* at 406 (quoting *NASD Code of Arbitration Procedure*, Part III, Sec. 12(a), P3712, *reprinted in NASD Manual* (CCH) 3613-3).

One of Patten's customers filed a statement of claim against Patten with the NASD Director of Arbitration. The NASD accepted the claim and, according to its procedure, initiated arbitration proceedings. In response, Patten filed a complaint in the district court and moved for an order compelling the customer to discontinue the NASD arbitration. The district court denied the order. The Third Circuit affirmed, holding that: "It is therefore clear that . . . [the customer] can demand NASD arbitration of its disputes with Patten by virtue of 412(a), and *Patten is compelled by its NASD membership* to submit even absent a specific contractual arbitration undertaking directly with [the customer]." *Id.* at 406 (emphasis added). Thus Patten was compelled by virtue of its NASD membership to arbitrate its customer's claim.

In a parallel case, the defendants in *Paine, Webber, Jackson & Curtis v. Chase Manhattan*, 728 F.2d 577 (2d Cir. 1984), non-members of the NYSE, sought to compel plaintiff Paine Webber, a member of the NYSE, to submit its claim against the defendants to NYSE arbitration. The defendants did not claim that they had an agreement with Paine Webber requiring the submission of disputes between

them to arbitration. Rather they relied exclusively on the Constitution and Rules of the NYSE which require NYSE members to submit to arbitration any controversies with non-members arising out of the member's business. *Id.* at 579.

The district court found that the parties had not indicated any intention to be bound by the NYSE arbitration provisions and, in the absence of such an agreement between the parties requiring arbitration, Paine Webber could not be compelled to arbitrate its claims. *Id.* at 580. On appeal, the Second Circuit rejected this analysis. Contrary to the district court, the reviewing court held that membership in the NYSE, with its concomittant obligation to be governed by the Constitution and Rules of the NYSE, was sufficient to constitute consent to arbitration. The court stated: "we believe that *the arbitration provisions of the NYSE Constitution and Rules are sufficient in and of themselves to compel arbitration* of covered disputes under § 3, whether or not they are incorporated in a purchase and sale agreement." *Id.* The Second Circuit nevertheless upheld the result that arbitration could not be compelled in that case because the dispute at issue was not a covered dispute. The court's holding that the arbitration provisions of the NYSE Constitution and Rules are sufficient in and of themselves to compel arbitration of covered disputes was consistent with past decisions of that court. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1288-1289 (2d Cir. 1984) (despite inapplicability of specific NYSE employee arbitration rule, provision of NYSE Constitution allowing non-members to compel arbitration of any controversy "arising out of the business" of a member was sufficient to compel member to arbitrate employee's claims); *Coenen v. R.W. Pressprich*, 453 F.2d 1209, 1211-1212 (2d Cir. 1972) (member signed a pledge to abide by the entire Constitution which contained an arbitration provision; the court held that "one desiring the benefits of membership in the New York Stock Exchange must be willing to live up to the responsibilities of such membership" and therefore

ordered the member to arbitrate); *Axelrod & Co. v. Kordich, Victor & Neufeld*, 451 F.2d 838, 840-841 (2d Cir. 1971) (by virtue of member's agreement to be governed by the NYSE's Constitution, non-member broker-dealer firm may invoke the compulsory arbitration rules of the NYSE over the opposition of a member firm). Consistent with the parallel rulings of the Second and Third Circuits we hold that by virtue of its continued membership in the CBOT, Geldermann consented to the resolution of claims against it in customer-initiated arbitration proceedings.[9]

Yet Geldermann questions its "voluntary" consent to a rule which was added to the CBOT's rule book over the exchange's protest. It is indisputable that the CBOT has strenuously and repeatedly objected to mandatory arbitration. The CBOT adopted Regulation 620.01(B) under

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[9] We recognize that our holding may seem to present a catch-22 situation in which a CBOT member's claim against arbitration will always be either not ripe for adjudication or waived. For example, our dictum in *CBOT v. CFTC* suggested that the CBOT's jurisdictional problem satisfying the ripeness requirement might be solved in a suit brought by a member to enjoin arbitration. *CBOT v. CFTC*, 704 F.2d at 933. Yet now, when a member brings such a suit, we hold that its status as a member solves the procedural problem but waives its substantive claim. But this is not really a catch-22 situation because Geldermann could have satisfied the ripeness requirement and preserved its constitutional claim by resigning its membership in the CBOT. When viewed in the context of the highly regulated commodities industry, this is not such an extreme step to demand in order to retain a constitutional right. Geldermann receives substantial benefits from the highly regulated nature of the industry. Kevin Mack, the president of Geldermann, stated in his affidavit, "the market activities of member firms under the Act are subject to the constant scrutiny of the exchange's surveillance and disciplinary system, a circumstance reassuring to significant commercial entities." It is reasonable to infer that the significant commercial entities that are Geldermann's customers also find it reassuring that they can, under the rules of the exchange, compel Geldermann to arbitrate claims they have against it. Geldermann cannot continue to have the benefits of membership while refusing to accept its concomitant responsibilities.

compulsion and the CBOT amended the Regulation to include a disclosure of its questionable legality and a description of the procedure by which a member might challenge the Regulation, see *supra* at 8. But Geldermann itself has not consistently objected to customer-initiated arbitration proceedings under the Regulation. In fact a review of the factual background that produced the particular arbitration dispute underlying this case highlights the manner in which Geldermann's objection in this case resembles the belated, self-serving objection of the plaintiff in *Schor*.

Defendant FSI is not a party in this appeal, but was the party that brought the underlying arbitration demand. FSI is a futures commission merchant, but is not a member of the CBOT and thus cannot clear its customers' trades itself. Until May 1985, FSI maintained an omnibus account with Geldermann and conducted its customer trading on the CBOT through that account. In April 1985, pursuant to Rule 7.201 and Regulation 620.01(B), FSI initiated an arbitration proceeding against Geldermann for Geldermann's alleged failure to fill an FSI purchase order properly. Geldermann submitted to FSI's demand for arbitration of this claim without raising any objection regarding the constitutionality of the Rule and Regulation or claiming that it had not consented to be bound by the Rule and Regulation. The parties arbitrated the claim and Geldermann lost. The arbitrator awarded FSI $54,718.

Shortly after the arbitration, Geldermann notified FSI that it was terminating FSI's account and requested that FSI make immediate arrangements to transfer all of its open positions to another CBOT member firm. FSI arranged to transfer its open positions and, in effectuating the transfer, Geldermann charged FSI the full round-turn commission for each open position transferred. In May 1985, FSI again initiated an arbitration proceeding against Geldermann for money damages for three claims, including a claim for interest due FSI as a result of Geldermann's late payment of the first arbitration award. This time Geldermann objected by filing this suit. See *supra* at 9.

Under a separate provision of the CEA, the plaintiff in *Schor* acted similarly. The CEA, in addition to providing for arbitration as an alternative to federal litigation, also provides a CFTC reparations proceeding to handle customer complaints. In that case plaintiff Schor invoked the CFTC's reparations jurisdiction by filing complaints against the defendant Conti with the CFTC. Before receiving notice that Schor had commenced the reparations proceeding, Conti filed a diversity action in federal district court to recover a debit balance in Schor's account. Schor counterclaimed in the district court action but moved on two separate occasions to dismiss or stay the district court action, arguing that the CFTC reparations proceeding would fully resolve and adjudicate all the rights of the parties with respect to the transactions which were the subject matter of the district court action. Although the district court declined to stay or dismiss the suit, Conti voluntarily dismissed the federal court action and presented its debit balance claim by way of a counterclaim in the CFTC reparation proceeding initiated by Schor. In the reparations proceeding, the Administrative Law Judge ("ALJ") ruled against Schor on both his claim and on Conti's counterclaim. Only after losing did Schor, for the first time, challenge the CFTC's statutory authority to adjudicate Conti's counterclaim. *Schor*, 106 S. Ct. at 3250-3251.

The Supreme Court held that Schor waived his right to an Article III forum because he demanded that Conti proceed on its counterclaim before the CFTC rather than in district court and "was content to have the entire dispute settled in the forum he selected until the ALJ ruled against him on all counts; it was only after the ALJ rendered a decision to which he objected that Schor raised any challenge. . . . " *Id.* at 3257. By initiating the reparations proceeding and expressly demanding that Conti proceed on its counterclaim in the reparations proceeding rather than before the district court, "Schor indisputably waived any right he many have possessed to the full trial of Conti's counterclaim before an Article III court." *Id.*

While Geldermann's consent to arbitration may not be as "indisputable" as Schor's consent to the adjudication of Conti's state law counterclaims in the CFTC reparations proceeding because Geldermann did not initiate and insist upon arbitration of this claim, comparison of the circumstances in which Geldermann and Schor first objected to the non-Article III adjudication of their claims supports our conclusion that Geldermann consented to customer-initiated arbitration under Regulation 620.01(B). Both Schor and Geldermann were content to have their disputes settled by a non-Article III forum until they lost. Both challenged the constitutionality of the Act only after an arbitration or reparations panel ruled against them. We conclude that both consented to adjudication by a non-Article III forum.[10]

B. *Non-waivable Article III Interests*

Our holding that Geldermann consented to arbitration, and thus waived any right he may have possessed to a full trial before an Article III court, is not completely dipositive of the issue. "Article III, § 1 not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances.' " *Schor*, 106 S. Ct. at 3257 (quoting *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 102 S. Ct. 2858, 2864). To the extent that this structural principle is implicated, notions of consent and

[10] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, is not to the contrary. In that case the litigants did not consent to a non-Article III adjudication of their claims. As stated in *Thomas*, *Northern Pipeline* does not hold that the right to an Article III forum is absolute unless the federal government is a party. *Thomas*, 105 S. Ct. at 3336. Also, the scope of jurisdiction of exchange arbitrators is limited to customer-broker claims arising out of exchange transactions in contrast to the bankruptcy court's broad jurisdiction in *Northern Pipeline*.

waiver are not controlling because the guarantees of Article III serve institutional interests that the parties cannot be expected to protect. *Schor*, 106 S. Ct. at 3257-3258.

However, the Supreme Court deliberately has not provided rules to determine when a given congressional decision to authorize the adjudication of Article III matters in a non-Article III forum implicates the structural principle of institutional integrity and overrides the consent of the parties. The Court has stated that "[a]lthough such [formalistic and unbending] rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." *Id.* at 3258. In avoiding unbending strictures the Court has "also been faithful to [its] precedents, which counsel that bright line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries." *Id.* at 3261. Accordingly, "in this area of 'frequently arcane distinctions and confusing precedents,' " *Thomas*, 105 S. Ct. at 3334 (quoting *Northern Pipeline*, 102 S. Ct. at 2881), we are left without a clear picture of when a particular congressional plan implicates this structural principle of institutional integrity.

Despite the express refusal of the Court in *Schor* to formulate bright line rules to follow in this area generally, the similarities between the congressional plans attacked by Schor and Geldermann make the analysis in *Schor* the most pertinent guide for us in this case. The plaintiffs in both *Schor* and this case challenged the CEA, particularly Congress' power to allow the adjudication of state common law claims in a non-Article III forum[11]

[11] Although the claims in both cases were state law claims, actual or potential diversity jurisdiction existed. The plaintiff on the counterclaim in *Schor* had originally brought the claim in federal court on the basis of diversity jurisdiction. *Schor*, 106 S. Ct. at 3258. It also appears diversity exists between Geldermann, an Illi-

(Footnote continued on following page)

under CEA Sections 14 and 5a(11). Both the reparations procedure at issue in *Schor* and the arbitration procedure at issue here were created by Congress to provide inexpensive and expeditious alternative forums in which customers could settle their claims against professional brokers. In each instance Congress gave the CFTC or arbitrators the authority to adjudicate such matters but left entirely to the complaining parties the decision to invoke either forum. See *Schor*, 106 S. Ct. at 3260. In support of these delegations, the Court in *Schor* stated that, "[i]n such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing participants may, at their option, elect to resolve their differences." *Id.* From the above-quoted language it appears that the Supreme Court would view the congressional scheme of allowing commodity customers the option of electing arbitration as intruding on the province of the judiciary even less than the reparations procedure in *Schor*. To justify the reparations procedure challenged in *Schor*, the Court analogized it to a situation in which the legislature encouraged parties to arbitrate; a situation for which the Court believed it was self-evident that no impermissible incursion on the separation of powers was involved. Under Section 5(a)(11), Congress provides commodity customers the option of electing arbitration. Provision of this option does not violate the separation of powers.

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[11] *continued*

nois corporation, and FSI, a New York corporation. However, we note that if, in the absence of an available arbitration procedure, FSI chose to file in Illinois state court rather than in federal court, as a resident defendant, Geldermann could not remove the suit to federal court, 28 U.S.C. § 1441(b), and without any violation of the Constitution would be foreclosed from an Article III forum.

The fact that the non-Article III forum challenged is arbitration is also of importance. Recently in a case arising in the related securities industry, the Supreme Court reaffirmed that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, establishes a " 'federal policy favoring arbitration.' " *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2337 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941). The Court of Appeals for the District of Columbia found that:

> [t]he rationale for this policy is at its strongest where the arbitration will be governed by procedures specifically tailored to the context from which the agreement to arbitrate arises, and will be conducted by arbitrators who are expert in the norms and practices of the relevant industry. Labor arbitration is one such context. The arbitration system of the New York Stock Exchange is another.

Pearce v. E.F. Hutton Group, Inc., No. 86-5281 (D.C. Cir. Sept. 11, 1987). We agree and add a third system to the securities and labor list—the arbitration system of the Board of Trade of the City of Chicago. Providing arbitration as an option for customers with complaints against members of the CBOT is consistent with the strong federal policy favoring that method of disposition.

We recognize that although the federal scheme of providing commodity customers the option of demanding arbitration of their claims is consistent with the federal policy favoring arbitration, in this case it is state law that authorizes and defines arbitration and state courts that enforce arbitration awards. See, *e.g.*, Ill. Rev. Stat. ch. 10, § 101 *et seq.* (1985) (the Uniform Arbitration Act). The arbitration rules and regulations adopted by the CBOT in response to Section 5a(11) acknowledge state control in this area and specifically incorporate and comply with the Uniform Arbitration Act of Illinois, *CBOT Rules and Regulations*, Regulations 601.00, 603.06 and 640.05. Therefore, through the operation of Section 5a(11) and the CBOT regulations, Congress is here requiring the Illinois state

arbitration system and Illinois state courts to assist in the administration of a federal scheme.

Although having the states actively participate in implementing a federal program appears unique, a similar scheme was upheld in *FERC v. Mississippi*, 456 U.S. 742. There the statute challenged by the state of Mississippi required the use of state regulatory machinery to advance federal energy goals. The Supreme Court upheld the requirement that the Mississippi Public Service Commission adjudicate disputes arising under the federal statute because "the policy of the federal Act is the prevailing policy in every state" and should be respected accordingly. *Id.* at 760 (quoting *Testa v. Katt*, 330 U.S. 386, 393). Consistent with this Supreme Court precedent, Congress and the CBOT can require the Illinois arbitration apparatus and Illinois state courts to administer customer-initiated arbitration allowed under the CEA.

Finally, a holding that Section 5a(11) implicates the structural principle of institutional integrity and thus violates Article III would not prevent customers, despite the objection of CBOT members, from removing commodity cases from the reach of an Article III forum. All such cases, including state law counterclaims, could still be heard by the CFTC in reparations proceedings without violating the Constitution. See *Schor*, 106 S. Ct. at 3260.

For the reasons set forth above, we hold that neither Section 5a(11) nor CFTC Rule 7.201 nor CBOT Regulation 620.01 threatens the structural integrity of the courts or the separation of power between the branches of the federal government. Therefore Geldermann's waiver of its personal right to an Article III forum is binding. Compelling Geldermann to arbitrate FSI's claims against it does not violate Article III.

III. *Arbitration Here Does Not Implicate the Seventh Amendment.*

Geldermann also contends that the mandatory customer-initiated arbitration plan violates its right to a jury trial under the Seventh Amendment. Because the district court

held that Section 5a(11) does not require the CFTC to promulgate mandatory arbitration rules, it did not evaluate the constitutionality of the CEA, but only whether CFTC Rule 7.201 and CBOT Regulation 620.01(B) violate the Seventh Amendment. *Geldermann*, No. 85 C 07350, slip op. at 7. It held that both violate Geldermann's rights under the Seventh Amendment. We reverse.

In addressing Geldermann's two contentions, that the mandatory arbitration violated his rights under Article III and the Seventh Amendment, the district court appears to have considered the two challenges as independent and alternative grounds for relief. It first addressed Geldermann's Seventh Amendment challenge; then, having ruled that the arbitration plan violated that Amendment, the court concluded that it "need not address Geldermann's Article III claim." *Id.* at 13. The district court resolved the problem backwards. The court should have first addressed the issue of whether Geldermann had the right to an Article III forum; then if it ruled that no such right existed, it need not have addressed Geldermann's Seventh Amendment claim. In a non-Article III forum the Seventh Amendment simply does not apply. See, *e.g.*, *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 449-461 (action for civil penalties before Occupational Safety and Health Review Commission not jury triable of right); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (Seventh Amendment does not apply to suit for backpay before National Labor Relations Board); see also Note, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 Yale L.J. 1459, 1459-1460 (1986). Because we hold that Geldermann is not entitled to an Article III forum, the Seventh Amendment is not implicated.

REVERSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GELDERMANN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 85 C 07350
	)	
BOARD OF TRADE OF THE CITY OF CHICAGO, a specially chartered Illinois corporation; COMMODITY FUTURES TRADING COMMISSION, a United States Government agency; and FSI FUTURES, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Geldermann, Inc. brought this action for an order enjoining the Chicago Board of Trade ("CBT") from requiring Geldermann to arbitrate a customer claim. Geldermann named as defendants the CBT, the Commodity Futures Trading Commission ("CFTC") and FSI Futures, Inc. ("FSI"), a former customer of Geldermann. Geldermann claims that the mandatory arbitration scheme in CFTC Regulation 7.201 and in CBT Rule 620.01(B) violates Geldermann's constitutional rights.

In October 1985 Geldermann and the CFTC filed cross-motions for summary judgment. On March 28, 1986 this court denied both motions, finding that Geldermann's pos-

sible consent to the CFTC mandatory arbitration scheme constituted a genuine issue of material fact. In April and June, 1986, after they had briefed the consent question, both parties renewed their motions for summary judgment. In July, 1986 the Supreme Court decided *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986). In July and August, 1986 the parties submitted briefs addressing *Schor's* impact on this litigation.

BACKGROUND FACTS

The parties do not dispute the material facts underlying this litigation. Geldermann, Inc. is a commodity brokerage firm. It is registered with the Commission as a futures commission merchant pursuant to § 4d(1) of the Commodity Exchange Act, 7 U.S.C. § 6d(1) (the "CEA"). Geldermann is a member firm of the Chicago Board of Trade.

The Commodity Futures Trading Commission is an independent federal agency established pursuant to the CEA. The CFTC regulates commodity exchanges such as the CBT. The Commission is empowered under Section 8a(5) of the CEA, 7 U.S.C. § 12a(5) to make rules and regulations to effectuate the purposes of the CEA and under Section 8a(7) of the CEA, 7 U.S.C. § 12a(7) to alter the rules of a contract market.

The CBT is a specially chartered Illinois corporation. The CFTC regulates the CBT and has designated it as a contract market. As a contract market, the CBT is required to submit its rules to the Commission for approval and to:

> provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: Provided, that (i) the use of such procedure by a customer shall be voluntary and (ii) the

> term "customer" as used in this paragraph shall not include another member of the contract market . . ."

7 U.S.C. § 7(a)(11)[1].

FSI Futures, Inc. is a foreign corporation with its principal place of business in New York. It is licensed by the Commission as a commodity futures commission merchant. FSI is not a member of the CBT. Until May, 1985, it was a customer of Geldermann, having maintained an omnibus account with Geldermann through that date. FSI regularly conducted its customer trading on the CBT through that account.

FSI seeks arbitration under CFTC Regulation 7.201 and CBT Rule 620.01(B), which provide that a customer may compel a CBT member to submit to arbitration:

> *Customer's Claims and Grievances.* The Arbitration Committee and Mixed Panels constituted pursuant to Regulation 620.02 have jurisdiction to arbitrate all customer's claims and grievances against any member or employee thereof which have arisen prior to the date the customer's claim is asserted. If the customer elects to initiate an arbitration proceeding of any customer claim or grievance, the member shall submit to arbitration in accordance with these Arbitration Rules and Regulations.

The CFTC passed this mandatory arbitration rule in November, 1981 when, under its powers to alter exchange rules, it disapproved the CBT's proposed voluntary arbitration rule.

The CBT previously sought to void Commission Regulation 7.201 and CBT Rule 620.01(B) in *Board of Trade*

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[1] In 1982 Congress deleted several additional provisos to 7 U.S.C. § 7(a)(11). Congress deleted (1) the proviso that "the procedure shall not result in any compulsory payment except as agreed upon between the parties,"; (2) a $15,000 ceiling on the kind of claims which a customer can seek to arbitrate; and (3) a proviso which declared that a floor broker could not be a "customer."

of City of Chicago v. Commodity Futures Trading Commission, No. 81 C 7175 (N.D. Ill. April 23, 1982) (hereinafter *CBT v. CFTC*). In *CBT v. CFTC*, CBT claimed that (1) the Commission acted arbitrarily in promulgating Reg. 7.201 because the Commission wrongly believed that Section 5a(11) of the CEA required a compulsory arbitration and (2) the mandatory arbitration procedure deprives CBT members of their Seventh Amendment right to a jury trial. The CFTC defended the suit by claiming that the CBT lacked standing, that the lawsuit did not present "ripe" issues, and that the Seventh Amendment did not apply to claims subject to compulsory arbitration.

On April 23, 1983, the district court in *CBT v. CFTC* entered judgment for the CBT. The district court permanently enjoined the CFTC from enforcing Commission Rule 7.201. The district court held that the rule violated the Seventh Amendment by compelling CBT members to arbitrate common law legal claims. The district court also held that the CEA does not require the CFTC to adopt a mandatory arbitration rule.

On appeal, the Seventh Circuit reversed on grounds of ripeness. *CBT v. CFTC*, 704 F.2d 929 (7th Cir. 1983). The Seventh Circuit held that neither the CBT nor its members had suffered harm from the CFTC regulation and that the case lacked a "specific factual context." Furthermore, the Seventh Circuit wrote, the CFTC might "choose not to apply its rule" when presented with a particular customer demand for arbitration. The Seventh Circuit concluded that it could not decide, in the case before it, whether the CFTC regulation violated the Seventh Amendment.

When Geldermann became a CBT member, it agreed to abide by all regulations prescribed by the exchange. All CBT rules are listed in its rulebook. Since 1983 the CBT rule book has included the following footnote:

> The legality of Rule 7.201 and thus the obligation of Board of Trade members to arbitrate customers' claims and grievances, has been the subject of litiga-

> tion between the Board of Trade and the CFTC. In 1982, the United States District Court for the Northern District of Illinois declared the Rule invalid, holding that the CFTC Rule 7.201 is an unconstitutional denial of the right to a jury trial. However, on April 5, 1983, the Seventh Circuit Court of Appeals held that the case was not yet "ripe" for adjudication. While the Court did not rule on the merits, the Court went on to say: "Moreover, the Board need not flout the rule in order to challenge its validity. A member or employee ordered by the Board or the Commission to arbitrate under Rule 7.201 could simply bring a suit to enjoin arbitration or to enjoin enforcement of an arbitration award against him on the ground that the Commission's rule requiring arbitration is invalid."

In April, 1985 FSI asserted a claim against Geldermann based on Geldermann's failure to fill a purchase order. Geldermann and FSI arbitrated this claim. The arbitrator awarded FSI $54,718. Shortly after the arbitration, Geldermann notified FSI that it wished to terminate its relationship with FSI and requested that FSI make immediate arrangements to transfer all open positions to another clearing firm. FSI charged Geldermann "full round" commissions for this transfer service. FSI seeks to arbitrate the question whether, by charging these commissions, FSI breached an agreement with Geldermann.

On May 24, 1985, FSI filed a demand with the CBT for arbitration against Geldermann seeking money damages for three claims. The first claim was for the $22,165.22 in commissions which Geldermann charged FSI when Geldermann transferred to another brokerage firm all FSI positions and cash balances. FSI's second claim was for interest allegedly due FSI as a result of Geldermann's delay in forwarding FSI's cash balances. FSI's last claim was for interest allegedly due FSI as the result of Geldermann's late payment of the earlier arbitration award.

Geldermann objects to FSI's demand for compulsory arbitration. Geldermann asserts that FSI's claims are claims

at common law, so that (1) under the Seventh Amendment, Geldermann has a right to have them tried by a jury, and (2) under Article III of the United States Constitution, Geldermann has a right to have the claims tried in the district court. Geldermann requests (1) a declaration that, as applied to the FSI claims in issue, Commission Regulation § 7.201 and CBT Rule 620.01(B) abridge Geldermann's rights under the Seventh Amendment and Article III, and (2) an injunction against compulsory arbitration.

DISCUSSION

This court must initially define the scope of Geldermann's challenge. The CEA requires a contract market to:

> provide a fair and equitable procedure through arbitration or otherwise . . . for the settlement of customer's claims and grievances against any member or employee thereof: provided that the use of such procedure by a customer shall be voluntary . . .

7 U.S.C. § 7(a)(11).

This provision (in conjunction with 7 U.S.C. § 12(a)(5), which authorizes the CFTC to pass all regulations necessary to effectuate the purposes of the CEA) authorizes the CFTC to pass a regulation requiring brokers to arbitrate customers claims. § 5(a)(11) does not, however, require the CFTC to pass a mandatory arbitration regulation. The CFTC could have passed a regulation providing that arbitration would proceed only if both broker and customer so agreed. *See CBT v. CFTC*, No. 81 C 7175, slip op. (N.D. Ill. April 23, 1982). Because this court concludes that the CEA does not itself require Geldermann to arbitrate FSI's claim, this court need not evaluate the constitutionality of the CEA.

The Seventh Amendment provides that "(in) suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. Const. Amend. VII. Whether the Seventh

Amendment guarantees CBT members the right to have a customer claim tried before a jury depends upon the nature of the claim, the kinds of rights the client asserts and the type of relief the client requests. *CBT v. CFTC*, 704 F.2d 929, 932 (7th Cir. 1983).

If a client asserts legal rights which entitle him to a money judgment of the kind customarily granted by a court of law, *Dairy Queen v. Wood*, 369 U.S. 469, 477-8 (1962), the Seventh Amendment applies. The Seventh Amendment applies even to rights "unheard of at common law," *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974), so long as they are of the sort traditionally enforced in an action at law. *Id.*

FSI's claims against Geldermann are of a traditionally legal character. FSI asserts that Geldermann breached an agreement and deviated from trade practice in charging FSI "round turn" commissions. FSI also claims that Geldermann transferred open positions three days later than FSI instructed and that this delay caused FSI financial loss of $894.44.[2] Finally, FSI claims that, by failing to remit the April 8, 1985 arbitration award until May 9, 1985, Geldermann deviated from the parties' course of dealings. FSI's claims sound in contract, debt and conversion. Contract, debt and conversion claims have traditionally been triable to a jury.[3] *See Ross v. Berhard*, 396 U.S. 531, 542, 90 S.Ct. 735, 740 (1977).

While a party can waive his right to a jury trial, *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985) Geldermann has not done so. Seventh Amendment rights

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[2] FSI borrowed $1,400,000.00 to cover the cost of margin at the transferee clearing firm. The interest on this loan for two days is $894.44.

[3] State law creates and provides the rule of decision for the rights which FSI asserts; FSI's claims do not involve "public rights." *Cf. Thomas v. Union Carbide Agr. Products Co.*, ___ U.S. ___, 105 S.Ct. 3325 (1985); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 97 S.Ct. 1261 (1977).

may only be waived knowingly, intentionally and voluntarily. *Leasing Service Corp. v. Crane, et al.*, No. 85-1679, 85-1755 slip op. (4th Cir. October 30, 1986); *K.M.C. supra* at 755-6; *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977); *Rocco Ferrera & Co., Inc. v. G.H.A. Lockjoint, Inc.*, No. 85-7186, slip op. (N.D. Ill. October 11, 1985). Courts are to narrowly construe a waiver of Seventh Amendment rights and are to indulge in every reasonable presumption against waiver. *See also Beacon Theater, Inc. v. Westover*, 359 U.S. 512, 79 S.Ct. 948 (1959); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 812 (1937). This court cannot conclude that Geldermann knowingly, intentionally and voluntarily relinquished its right to a jury trial.

Upon becoming a CBT member, Geldermann signed a form contract, agreeing generally to abide by all CBT rules and regulations. Since 1983, the CBT included a disclaimer in its rulebook stating that a Northern District of Illinois court had invalidated Regulation 7.201 as a violation of the Seventh Amendment. The disclaimer also stated that, in 1983, the Seventh Circuit (1) had vacated the district court decision on ripeness grounds and (2) had suggested the proper procedure for challenging Regulation 7.201. Thus, while the disclaimer notified Geldermann of the mandatory arbitration scheme in Regulation 7.201 and CBT Rule 620.01(B), the disclaimer did not make clear that, if Geldermann accepted CBT membership, Geldermann would waive its Seventh Amendment rights. Rather, the disclaimer suggested that a court would again invalidate the regulation when a member challenged it in the proper procedure. Geldermann did not, in these circumstances, knowingly and intentionally waive its Seventh Amendment right.[4]

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[4] The Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 95, 92 S.Ct. 1983, 2002 (1972) wrote:

> . . . a waiver of constitutional rights in any context must, at the very *least*, be clear. We need not concern ourselves with

(Footnote continued on following page)

Neither did Geldermann "voluntarily" waive its Seventh Amendment right. In order to become an exchange member Geldermann had to agree to abide by all CBT rules and regulations. Exchange membership is an economic necessity for Geldermann's conduct of business. *See* Affidavit of Kevin Mack, President of Geldermann, Inc. Where the parties to this contract (the CBT and Geldermann) are of such grossly unequal bargaining power, this court cannot consider Geldermann's agreement to the contract to be a "voluntary" waiver of its constitutional rights. If it was to continue in business, Geldermann had no choice but to accept the CBT's rules and regulations. *See Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972) (defendant did not waive his due process rights when parties had not bargained over waiver clause, contract was an adhesion contract and parties had unequal bargaining power); *Serpas, Johnson & Waters v. Schmidt, et al.*, No. [illegible] slip op. (7th Cir. December 19, 1986) (holding that the Illinois Racing Board may not issue licenses to backstretch workers on the condition that licensees consent to a waiver of Fourth Amendment rights); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1042 (7th Cir. 1984) (upholding Federal Magistrate Act's scheme for waiver of constitutional rights but stressing that litigants must have "reasonable and viable choice"; plaintiff in this case had not shown "hard evidence of economic, or other systemic coercion"); *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (defendant did not waive his jury trial right, despite his signature on contract with express waiver clause; waiver clause was

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[4] *continued*

the involuntaries or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.

See also K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) (the district court could not find that plaintiff waived its jury trial right, as defendant may have told plaintiff that waiver clause would not be enforced).

part of a form contract and defendant had no choice but to accept the contract "if he was to get badly needed funds"); *Rocco Ferrera & Co., Inc. v. G.H.A. Lockjoint, Inc., et al.*, No. 85-7186 slip op. (October 11, 1985) ("Waiver is not the norm, because the bargaining power of the parties is frequently unequal and the plaintiff may not be in a position to object to the contractual waiver."); *Evans v. City of Chicago*, 522 F.Supp. 789, 795 (N.D. Ill. 1980) ("since plaintiffs may show that paragraph 9 put them to the choice of either (1) not settling and thus incurring additional substantial delay or (2) waiving their rights . . . we can't conclude at this stage of the proceeding that the element of voluntariness necessary for a relinquishment of constitutional rights is present here.").

The Supreme Court's decision in *Thomas v. Union Carbide Agricultural Products Co.*, 105 S.Ct. 3325 (1985) and in *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986) do not require this court to conclude that Geldermann waived its Seventh Amendment rights. In *Thomas* the Supreme Court upheld, against an Article III challenge, the mandatory arbitration scheme in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The plaintiff in *Thomas* did not raise a Seventh Amendment issue. More importantly, the Supreme Court did not rest its decision on a finding that plaintiff had waived its Article III right by registering under FIFRA. The Court held instead that plaintiff did not *have* an Article III right to a federal court determination.

In *Schor* the Supreme Court upheld, against an Article III challenge, CFTC jurisdiction over permissive counterclaims in CEA reparations actions. 106 S.Ct. 3245 (1986). The Court held that a party could waive his Article III rights either expressly or by foregoing an available Article III forum. *Schor* does not allow this court to find that Geldermann waived its jury trial right. Geldermann did not forego a jury trial of FSI's claims; whether Geldermann can try FSI's claims before a jury (or in any non-arbitration forum) is the issue in this case.

Because this court concludes that Regulation 7.201 and CBT Rule 620.01(B) violate Geldermann's Seventh Amendment right, this court need not address Geldermann's Article III claim. It appears, however, that Geldermann's Article III claim is a strong one.

Article III creates both a waivable personal interest and a nonwaivable "structural" interest in preserving the separation between federal governmental powers. *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245 (1986). Article III bestows a personal right to a federal tribunal on a party who asserts private rights. In the present case, Geldermann wishes to defend itself against FSI's private, state law created claims. As discussed earlier, Geldermann has not knowingly, intentionally and voluntarily waived its personal Article III right.

In addition, Regulation 7.201 and CBT Rule 620.01(B) implicate the structural protections of Article III. Courts balance several factors in determining whether legislation impermissibly threatens the institutional integrity of the federal judiciary: the extent to which Article III courts retain the essential attributes of judicial power, the extent to which non-Article III forums exercise powers vested only in Article III courts, the origins and importance of the rights asserted and the concerns that drove Congress to depart from Article III requirements. *Schor, supra* at 3258. Although separation of powers concerns diminish when a party willingly elects to forego an Article III forum, Geldermann has not done so. When consent to Regulation 7.201 is not truly knowing and voluntary, the regulation erodes the structural protections of Article III.

CONCLUSION

For the foregoing reasons, this court holds that Regulation 7.201 and CBT Rule 620.01(B), as applied to Geldermann in this case, violate the Seventh Amendment. This court permanently enjoins and restrains the CFTC from requiring Geldermann to arbitrate the FSI claims.

ENTER:

/s/ JAMES F. HOLDERMAN
JAMES F. HOLDERMAN
United States District Judge

DATED: 12-30-86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

GELDERMANN, INC.
Plaintiff

v. Case Number: 85 C 7350

BOARD OF TRADE OF THE CITY OF CHICAGO, etc., et al.
Defendants

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Regulation 7.201 and CBT Rule 620.01(B), as applied to Geldermann in this case, violate the Seventh Amendment. This Court permanently enjoins and restrains the CFTC from requiring Geldermann to arbitrate the FSI claims.

December 30, 1986
Date

H. STUART CUNNINGHAM
Clerk

/s/ KATHLEEN BRANCH
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GELDERMANN, INC.,

Plaintiff,

v.

BOARD OF TRADE OF THE CITY OF CHICAGO, etc., et al.,

Defendants.

No. 85 C 07350—Honorable James F. Holderman

AFFIDAVIT OF KEVIN MACK

I, Kevin Mack, on oath state:

1. I am president of Geldermann, Inc. I have personal knowledge of the matters set forth in this affidavit and could competently testify to them if called as a witness in this case.

2. Geldermann is a commodity brokerage firm formerly known as Geldermann-Peavey, Inc. It is a subsidiary of ConAgra, Inc., an international conglomerate in grain, food and commodity related businesses. Measured by the customer balances it carries, Geldermann is reputed today to be the largest commodity brokerage firm in the United States.

3. Commodity futures contracts are contracts to purchase and take delivery of or sell and deliver a specified quantity and quality of a named commodity within a certain time period in the future at an agreed upon price. The term "commodity" as it is used in the Commodity

Exchange Act (the Act), 7 USC Sections 2a(1) *et seq*, embraces virtually any article of commerce and every service, right or interest as to which future delivery is contemplated and includes such items as grains and livestock, precious and industrial metals, petroleum products, financial instruments and stock indices. Under the Act, commodity futures contracts may be entered into only on contract markets (also called commodity exchanges) designated and regulated by the Commodity Futures Trading Commission, the government agency charged by Congress with implementation and enforcement of the Act and the regulation of the futures industry. There are ten exchanges in the United States today. Substantially all of the many different commodity futures contracts are traded only on one exchange. The only exception of consequence is the MidAmerica Commodity Exchange on which smaller size contracts of contracts traded on the larger exchanges are traded. Volume on MidAmerica accounts for less than 2% of the total on U.S. Exchanges.

4. Actual trading of a commodity futures contract occurs in a designated area of an exchange floor, typically in a large well or "pit" in which those authorized to execute trades (exchange members) gather. Trading is accomplished through open-outcry, an auction process in which prospective buyers and sellers or agents for them cry out the price and number of contracts into which they are willing to enter. A contract is executed when one pit participant by public out-cry accepts the proposal of another.

5. The Chicago Board of Trade (CBT) is the largest contract market in the United States. It is the primary market for grain futures (wheat, corn, oats and the soybean complex), a market for precious metal futures, and the only market for certain financial futures, e.g. the GNMA mortgage interest rate futures contracts, the long term U.S. Treasury Bond futures contract, the U.S. Treasury Notes futures contract and the Major Market Index futures contract. Commercial interest in some of these contracts, particularly in the financial futures area,

has exploded in recent years. For example, 40,448,000 U.S. Treasury Bond contracts were traded on the CBT in 1985. This represented about 25.5% of all U.S. futures trading.

6. Under the Act, the Commission regulates industry participants who act on behalf of others through a registration process. For example: To participate in the auction process in the trading pit on behalf of another one must be a member of the particular exchange and register with the Commission as a floor broker. To hold customer funds one must register as a futures commission merchant (fcm), i.e. as a commodity broker. An individual who receives trading orders from the public must register as an associated person (AP) of an employing fcm or introducing broker (IB). The latter is a registrant which may take orders for its customers through its APs but may not hold customer funds. An IB places its customers trades on the books of a clearing member fcm who holds those customers' funds and clears their trades on a disclosed basis, i.e., the IB's customers are disclosed to the fcm who then confirms trades directly to the customers.

7. Registration with the Commission as a fcm makes it lawful for Geldermann to do business as a commodity broker, but Geldermann could not in fact conduct its business without clearing membership in the CBT and other major contract markets. Geldermann itself or through a subsidiary or affiliate is a clearing member of all U.S. commodity exchanges. Every major commodity brokerage firm competing with Geldermann is a CBT clearing member and clears most of the other principal exchanges.

8. By rule, only members of an exchange may be members of its clearing house. Clearing house membership is an indispensable prerequisite for retention of large commercial customers because only members of an exchange's clearing house can accept and execute trades of their customers on the floor of the exchange and carry those trades. Because clearing members are required to maintain a substantially greater net worth than non clearing

members and are subject to continuing and exacting scrutiny by the exchanges and their clearing organizations, they are perceived by the financial community to be more creditworthy. This is particularly important for commodity brokerage houses which operate only on their own credit, there being no counterpart to SIPC in the commodity industry.

9. Much of Geldermann's business derives from large commercial accounts, commodity pools, IBs and from other fcms who do not clear their own trades. For reasons which follow, these customers, many of whom trade actively in CBT futures, would not do business with Geldermann without the prestige and benefits enjoyed by Geldermann from its clearing member status in the CBT and other major exchanges:

a. Exchange membership is a precondition to presence on the floor and in the trading pits of an exchange. These floors and trading pits are invaluable, exclusive sources or market influencing information and the manner in which it is integrated into the auction process. From floor talk and pit activity one may determine or infer from moment to moment who is trading and at what price, who is buying, who is selling, who is waiting to enter or exit the market as well as the relationship between these factors. Geldermann's large commercial customers who make up a substantial part of its business require this information for trading purposes; demand it of Geldermann first hand and at the earliest possible moment; and are not willing to tolerate the time lapse, risk of inaccuracy or cost attendant upon obtaining it through an intermediary. For this reason Geldermann maintains telephone desks on the floor of the CBT and the other exchanges from which it communicates directly and continuously with its major customers before and during trading hours.

b. Floor presence, possible only with membership in an exchange, is also essential for Geldermann to

enable it to execute orders with the timeliness required by its commercial clientele. Many Geldermann customers take large positions in highly volatile markets and insist upon nearly instantaneous execution which Geldermann can accomplish to its considerable economic advantage through a system of hand signals called "arbing" from its personnel outside the pit to its brokers inside the pit. To illustrate, it is not unusual for the price of the CBT's U.S. Treasury Bond futures contract in an active market to move three ticks (one tick, 1/32nd of a point, is the minimum permissible price fluctuation) in a 15 second time period—a move which represents $93,750 on a 1,000 contract order. Geldermann's floor operations enable it to accept such an order, execute it at the market and report the "fill" in a 15 second period. Without exchange and clearing house membership it could not execute orders with the same speed and price advantage and hence could not acquire or retain its customer base.

c. By virtue of its CBT clearing membership, Geldermann is able to offer competitive commission rates to attract and keep substantial commercial customers. Non member fcms must execute their customers' trades through a clearing member fcm. Because of the interposition of a middle man, such trades require a higher commission rate which large commercial customers refuse to pay.

d. Clearing member fcms, from time to time, trade through another clearing member fcm to achieve anonymity. Without exchange clearing membership, Geldermann would not have access to this business.

e. Without clearing member firm status and being relegated to the position of another middleman, Geldermann would be foreclosed for purely economic reasons from receiving futures business from non clearing fcms on either an omnibus or fully disclosed basis, and from introducing brokers. Geldermann now receives substantial revenue from these sources.

f. Unlike those of non member fcms, the market activities of member fcms under the Act are subject to the constant scrutiny of the exchange's surveillance and disciplinary system, a circumstance reassuring to significant commercial customer entities. Moreover, through exchange membership an fcm has the opportunity to participate in the formulation of exchange policy and management of exchange affairs and thus advance its customers' interests.

/s/ Kevin Mack

Subscribed and sworn to
before me this 2 day
of June, 1986.

/s/ Ellen C. Kosick
Notary Public

RULE 28.1 LISTING

ConAgra, Inc. is the parent corporation of Geldermann, Inc. ConAgra also owns 100% of the voting securities of the following subsidiaries:

AgriBasics Fertilizer Company

Agricol Corporation, Inc. (owns 100% of the voting securities of four domestic corporations engaged principally in the worldwide commodities trading business)

Alliance Grain, Inc. (owns 100% of the voting securities of four domestic corporations engaged principally in the worldwide commodities trading business)

Armour Food Express Company

Atwood Commodities, Inc.

Atwood-Larson Company

Berger and Company (owns 100% of the voting securities of nine foreign corporations engaged principally in the worldwide commodities trading business)

CAG Company

Canadian Harvest Process (1986) Ltd. (Canada)

C & L Grain & Feed Co.

ConAgra Foreign Sales Corp., B.V. (Netherlands)

ConAgra International Fertilizer Company

ConAgra International, Inc. (owns 100% of the voting securities of thirty-one foreign corporations engaged principally in the worldwide commodities trading business)

ConAgra Pet Products, Inc. (owns 100% of the voting stock of Dyno Merchandise Corp. and Unique Packaging, Florida corporations)

ConAgra Poultry Company

ConAgra Spain, S.A.

ConAgra Transportation, Inc.

The Cropmate Company (owns 100% of the voting securities of Trekker Company, a Nebraska corporation)

CTC North America, Inc.

Interstate Feeders, Inc.

M & R Distributing

Ernest J. Miller Enterprises, Inc. (owns 100% of the voting securities of E. A. Miller, Inc. and Miller Brothers Company, Inc. Utah corporations)

Molinos de Puerto Rico, Inc.

Monfort of Colorado, Inc. (owns 100% of the voting securities of seven domestic and one foreign corporations engaged principally in the livestock feeding and processing business)

O'Donnell-Usen Fisheries Corporation (owns 100% of the voting securities of two foreign corporations engaged principally in the fishing and fish processing business)

Peavey Marts, Incorporated

Taco Plaza, Inc. (owns 100% of the voting securities of CAG Leasing Company, a Texas corporation)

To-Ricos, Inc.

United Agri-Products, Inc. (owns 100% of the voting securities of thirty domestic and one foreign corporations engaged principally in the agricultural chemicals business)

U.S. Tire, Inc.

Webber Farms, Inc.

Woodward & Dickerson (Japan) Ltd.

Bioter-Biona, S.A. (99% owned) (Spain)

Saprogal (Spain)

Sapropor (75% owned) (Portugal)

Trident Seafoods Corporation (45% owned)

Weld Agricultural Credit, Inc.

Geldermann, Inc. and six domestic and three foreign 100% owned subsidiaries

United Agri-Products Financial Services, Inc. and one 100% owned subsidiaries

Supreme Court, U.S.
FILED
JUN 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1584 and 87-1663

In the Supreme Court of the United States

OCTOBER TERM, 1987

GELDERMANN, INC., PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

BOARD OF TRADE OF CITY OF CHICAGO, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Commodity Futures Trading Commission exceeded its statutory authority or acted arbitrarily in adopting a rule requiring the members of the Board of Trade of the City of Chicago to arbitrate customers' claims at the customers' option.

2. Whether Section 5a(11) of the Commodity Exchange Act, 7 U.S.C. 7a(11), which requires regulated futures contract markets to provide customers of members the option of pursuing fair and equitable procedures for the arbitration of claims against a member, violates Article III of the Constitution or the Seventh Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Atlas Roofing Co. v. *OSHRC*, 430 U.S. 442 (1977)	6
Block v. *Hirsh*, 256 U.S. 135 (1921)	14
Board of Trade v. *CFTC*, 704 F.2d 929 (7th Cir. 1983)	4
Board of Trade v. *Olsen*, 262 U.S. 1 (1923)	10
CFTC v. *Schor*, No. 85-621 (July 7, 1986)	3, 5, 6, 10, 13, 14
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984)	7
Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985)	12
McDonald v. *City of West Branch*, 466 U.S. 284 (1984)	13
Moses H. Cone Memorial Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983)	12
Nelson v. *Secretary of Agriculture*, 133 F.2d 453 (7th Cir. 1943)	11
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)	6
Northern Pipeline Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)	13
Pernell v. *Southall Realty*, 416 U.S. 363 (1974)	14
Prima Paint Corp. v. *Flood & Conklin Mfg.*, 388 U.S. 395 (1967)	9
Shearson/American Express, Inc. v. *McMahon*, No. 86-44 (June 8, 1987)	12
Thomas v. *Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985)	5, 9, 10, 13
Tull v. *United States*, No. 85-1259 (Apr. 28, 1987)	14

Constitution, statutes and regulation:

U.S. Const.:	
Art. I	10
Art. III	*passim*

Constitution, statutes and regulation—Continued: Page

§ 1 5
Amend. V (Due Process Clause) 9
Amend. VII 3, 5, 6, 14
Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 701 *et seq.* 4
Arbitration Act, 9 U.S.C. 1 *et seq.* 12
Commodity Exchange Act, 7 U.S.C. (& Supp. IV) 1 *et seq.* 2
§ 2(a)(1)(A), 7 U.S.C. 2 ..... 2, 12
§ 3, 7 U.S.C. 5 2
§ 4(a), 7 U.S.C. 6(a) 2
§ 4(a), 7 U.S.C. 6(a)(2) 11
§ 4d(1), 7 U.S.C. 6d(1) 12
§ 5, 7 U.S.C. 7 2
§ 5a(11), 7 U.S.C. 7a(11) 2, 3, 4, 5, 6, 7, 8, 12
§ 6(a), 7 U.S.C. 8 2
§ 6(b), 7 U.S.C. 9 2
§ 8a(7), 7 U.S.C. 12a(7) 3
§ 14, 7 U.S.C. 18 2
Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. (& Supp. IV) 136 *et seq.* 9
Futures Trading Act of 1982, Pub. L. No. 97-444, § 217(a), 96 Stat. 2307 8
28 U.S.C. 1441(b) 9
17 C.F.R. 7.201 ..... 3, 5, 7, 8

Miscellaneous:

Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry, 93d Cong., 2d Sess. (1974) 8
41 Fed. Reg. 27526 (1976) 8
H.R. Rep. 97-565, 97th Cong., 2d Sess. Pt. 1 (1982) .. 8

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1584

GELDERMANN, INC., PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

No. 87-1663

BOARD OF TRADE OF CITY OF CHICAGO, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (87-1584 Pet. App. 1-26) is reported at 836 F.2d 310. The opinion of the district court (87-1584 Pet. App. 27-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1987. The petitions for a writ of certiorari were filed on March 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Commodity Exchange Act, 7 U.S.C. (& Supp. IV) 1 *et seq.* (CEA or Act), governs trading in futures contracts on "boards of trade," which are "exchange[s] or association[s] * * * engaged in the business of buying or selling any commodity or receiving the same for sale on consignment" (7 U.S.C. 2). The Act declares that transactions in commodity futures contracts "are affected with a national public interest" (7 U.S.C. 5). Accordingly, the Act gives the Commodity Futures Trading Commission (CFTC or Commission) the power to designate as "contract markets" boards of trade that satisfy certain requirements, and provides generally that commodity futures transactions in the United States may be executed lawfully only on contract markets and only through members of those markets. See 7 U.S.C. 6(a), 7, 8. The Commission oversees the operation of contract markets and has the authority to bring an administrative proceeding to suspend "all trading privileges" of, and otherwise sanction, any person who violates the Act or the Commission's regulations (7 U.S.C. 9).

The Act imposes certain duties on designated contract markets and their members. One of a contract market's duties, imposed by Section 5a(11) of the Act (7 U.S.C. 7a(11) (emphasis in original)), is to:

> [p]rovide a fair and equitable procedure through arbitration or otherwise * * * for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary and (ii) the term "customer" as used in this paragraph shall not include another member of the contract market * * *.[1]

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[1] The Act also provides a reparations procedure through which customers of commodity brokers may seek redress for the brokers' violations of the Act or the Commission's rules. See 7 U.S.C. 18. The

After Section 5a(11) was enacted, all 11 exchanges designated as contract markets submitted to the Commission for its approval proposed rules providing for arbitration of customers' claims against their members. Alone among the 11, petitioner Board of Trade of the City of Chicago (Board of Trade) submitted a proposed rule that did not give customers an absolute right to have their claims arbitrated; instead, the rule gave members of the Board of Trade the choice whether to agree to arbitration. The Board of Trade was thus the only futures market of the 11 markets then in existence not to adopt a rule requiring members to arbitrate claims by their customers. 87-1584 Pet. App. 4.

Under Section 8a(7) of the Act (7 U.S.C. 12a(7)), the CFTC is authorized "to alter or supplement the rules of a contract market * * * for the protection of traders or to insure fair dealings * * *." The CFTC asked the Board of Trade to amend its rule to require that its members submit customer claims to arbitration when the customer requests it. The Commission explained that such an amendment was required by Section 5a(11) of the Act—*i.e.*, that the section was intended to give the option to seek arbitration to the customer, not to the member of a contract market. The Board of Trade, however, refused to amend its proposed rule. Therefore, the CFTC, acting pursuant to Section 8a(7) of the Act, adopted Rule 7.201 (17 C.F.R. 7.201), which requires members of the Board of Trade to enter into arbitration of their customers' claims when the customer invokes arbitration. 87-1584 Pet. App. 5.[2]

Commission is assigned the task of administering this procedure, which was described by this Court in *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 2, as an "alternative to existing fora available to aggrieved customers, namely, the courts and arbitration."

[2] The Board of Trade immediately sought judicial review of Rule 7.201 on the ground that it deprived members of the Board of Trade of their Seventh Amendment right to a jury trial. The Seventh Circuit

2. Petitioner Geldermann, Inc., a commodity brokerage firm, is registered with the CFTC and is a member of the Board of Trade. In April 1985, FSI Futures, Inc. (FSI) initiated an arbitration proceeding against Geldermann. FSI claimed that Geldermann did not properly fill one of FSI's orders. Geldermann did not contest FSI's right to arbitration, and a Board of Trade arbitration panel awarded $54,718 to FSI. Soon thereafter, Geldermann notified FSI that it was terminating FSI's account. 87-1584 Pet. App. 19.

In May 1985, FSI again sought to arbitrate claims against Geldermann. FSI asserted claims for losses suffered in transferring its positions from Geldermann, and for interest allegedly due as a result of Geldermann's late payment of the first arbitration award. This time, Geldermann opposed FSI's arbitration demand. To avoid penalties for noncompliance with the rule requiring members to arbitrate customers' claims, Geldermann filed this action for an injunction against the CFTC and the Board of Trade. 87-1584 Pet. App. 19.[3]

3. The district court granted Geldermann's motion for summary judgment and permanently enjoined the CFTC from requiring Geldermann to arbitrate FSI's claims (87-1584 Pet. App. 39). The court held that the Commis-

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dismissed that action as not ripe. See *Board of Trade* v. *CFTC*, 704 F.2d 929 (1983). The court noted that the validity of the CFTC's rule could be tested by a member bringing suit to enjoin an arbitration proceeding demanded by a customer. See *id.* at 933. The Board of Trade published this dictum in a footnote to its rules. See 87-1584 Pet. App. 2-3.

[3] Geldermann's action against the Commission was brought under the Administrative Procedure Act (5 U.S.C. (& Supp. IV) 701 *et seq.*). Although the Board of Trade was named as a defendant, the Board of Trade supported Geldermann's position. In the court of appeals, therefore, the Board of Trade was aligned with Geldermann as an appellee (87-1584 Pet. App. 1).

The court observed that Geldermann was not compelled to become a member of the Board of Trade, and that Geldermann could preserve any right to an Article III court "by resigning its membership" (*id.* at 18 n.9.). The court also noted that Geldermann willingly consented to the first arbitration with FSI, which showed that Geldermann was "content to have [its] disputes settled by a non-Article III forum until [it] lost" (*id.* at 21).[5]

The court of appeals next ruled that Section 5a(11) of the Act does not exceed the non-waivable structural limits that Article III places on Congress (87-1584 Pet. App. 21-25). The court reached this conclusion by comparing this case to *CFTC* v. *Schor, supra,* in which the Court rejected an Article III challenge to the adjudication of common law counterclaims in connection with the reparation procedures under the CEA. The court of appeals stated that this Court would likely view the congressional scheme of allowing commodity futures customers the option of electing arbitration "as intruding on the province of the judiciary even less than the reparations procedure challenged in *Schor*" (87-1584 Pet. App. 23).

Finally, the court of appeals rejected Geldermann's contention that it has a Seventh Amendment right to a jury trial on FSI's claims (87-1584 Pet. App. 26). Citing *Atlas Roofing Co.* v. *OSHRC,* 430 U.S. 442, 449-461 (1977), and *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 48-49 (1937), the court of appeals stated that the Seventh Amendment "simply does not apply" in a non-Article III forum (87-1584 Pet. App. 26). Because Geldermann was not en-

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[5] In this respect, the court of appeals compared Geldermann to the respondent in *CFTC* v. *Schor, supra,* who objected to adjudication of common law claims in an administrative proceeding under the CEA only after adjudication of those claims: "Schor and Geldermann were content to have their disputes settled by a non-Article III forum until they lost" (87-1584 Pet. App. 21).

titled to an Article III forum, the court concluded that "the Seventh Amendment is not implicated" in this case (*ibid.*).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The Board of Trade argues (87-1663 Pet. 10-14) that the Commission exceeded its authority or acted arbitrarily in adopting Rule 7.201, which requires members of the Board of Trade to enter into arbitration of a customer's claim whenever the customer chooses that forum. The Commission's rule, however, is in full accord with the language and purpose of the relevant provision of the CEA.[6]

Section 5a(11) of the CEA states that "[e]ach contract market *shall* * * * [p]rovide a fair and equitable procedure through arbitration or otherwise * * * for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That (i) the use of such procedure by a customer shall be voluntary * * * " (7 U.S.C. 7a(11) (emphasis added)). The purpose evident in this language is to give customers of a member of a contract market the right, at their option, of arbitrating claims against the member. For that congressionally mandated option to be meaningful, members of a contract market must be required to submit to arbitration of claims at a customer's request.[7]

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[6] Of course, under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 845 (1984), unless the text of the statute and its legislative history conclusively resolve the question of interpretation *against* the Commission, the Commission's consistent interpretation of the CEA must be upheld if it is "a reasonable one."

[7] The statute (7 U.S.C. 7a(11)) requires the contract market to provide a fair procedure "through arbitration or otherwise." No one has

The legislative and administrative history of the provision is wholly consistent with this interpretation. When the Senate was considering in 1974 the bill that contained Section 5a(11), two representatives of the Board of Trade objected to the bill on the ground that it gave the customer, but not the member of a contract market, the option to avoid arbitration. *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry,* 93d Cong., 2d Sess. 524, 526 (1974). Congress passed the law over those objections. The Commission has consistently interpreted Section 5a(11) to give the customer the right to choose arbitration. See 41 Fed. Reg. 27526 (1976). In 1983, Congress amended Section 5a(11) in the Futures Trading Act of 1982, Pub. L. No. 97-444, § 217(a), 96 Stat. 2307. The House Committee Report noted at that time that the amendment did "not affect the existing requirement that the use of arbitration by the customer is voluntary or the Commission's understanding that exchange members must participate in arbitration proceedings which the customer has elected to pursue" (H.R. Rep. 97-565, 97th Cong., 2d Sess. Pt. 1, at 56 (1982)). It is clear, therefore, that the Commission did not exceed its statutory authority or act arbitrarily in adopting Rule 7.201.

2. Petitioners' principal contention (87-1584 Pet. 18-19; 87-1663 Pet. 14-19) is that Section 5a(11) of the CEA is unconstitutional because it deprives members of contract markets of a supposed "personal right" to have customers' claims against them adjudicated in an Article III forum.

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suggested that the words "or otherwise" alter the issue in this case. Whatever latitude those words may allow for a fair procedure that involves processes other than arbitration, they do not allow the market to select arbitration as the "fair and equitable procedure" and then make members' participation voluntary, as the Board of Trade attempted here.

But the claim as articulated by petitioners is plainly wrong; they have neither a statutory nor a constitutional right to be proceeded against in an Article III court. Petitioners stress (87-1584 Pet. 11-12; 87-1663 Pet. 20), that FSI's claims are essentially state common law claims sounding in "contract, debt and conversion" (87-1584 Pet. App. 33). Geldermann clearly has no *constitutional* right to have such claims adjudicated in a federal court. Indeed, because Geldermann is an Illinois citizen (*id.* at 22 n.11), if FSI had asserted state-law claims in an Illinois court, Geldermann could not have removed the action to a federal court even though there apparently is diversity of citizenship. See 28 U.S.C. 1441(b).

Petitioners' real contention, not articulated below or in the petitions, is that members of regulated futures markets have a constitutional right (perhaps grounded in the Due Process Clause) to insist that customers' claims against them be resolved by some judicial process and to refuse to resolve them through arbitration. That claim is wrong. The arbitration process itself, conducted under rules adopted by a board of trade, is obviously not inherently unfair to members. Cf. *Prima Paint Corp.* v. *Flood & Conklin Mfg.*, 388 U.S. 395 (1967) (upholding constitutionality of the federal Arbitration Act). And Congress may constitutionally require boards of trade to afford arbitration if it deems that appropriate to protect customers by providing an efficient remedy for their claims.

In *Thomas* v. *Union Carbide Agricultural Prods. Co.*, *supra*, the Court considered the constitutionality of the arbitration requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. (& Supp. IV) 136 *et seq.* (FIFRA)). Under that statute, a manufacturer must register its pesticides with the Environmental Protection Agency. To obtain a registration, the manufacturer must submit a large amount of data to the agency. As part of the process,

the submitting manufacturer agrees that subsequent registrants may rely on its data when they register their pesticides, and it agrees to accept compensation for this use as determined (in the absence of an agreement) by arbitration. Follow-on registrants, in turn, agree to pay compensation, determined by an arbitrator, for using an earlier registrant's data. Hence, consent to arbitration is a condition to registering a pesticide for sale and to gaining the benefits of an earlier registrant's data. In upholding this scheme, the Court noted that Congress has the power under Article I of the Constitution "*to condition* issuance of registrations or licenses on compliance with agency [arbitration] procedures" (473 U.S. at 589 (emphasis added)), and that "the follow-on registrant * * * explicitly consents to have his rights determined by arbitration" (*id.* at 592). See also *Schor,* slip op. 15-16 (one who seeks relief in a CFTC reparations proceeding validly waives, in return for the benefits of that procedure, the right to insist that a common law counterclaim be brought in an Article III court).

A member's consent to the arbitration of customer claims is likewise a reasonable condition of membership in a regulated futures market. Some 65 years ago the Court noted that the "Board of Trade conducts a business which is affected with a public interest and is, therefore, subject to reasonable regulation in the public interest." *Board of Trade* v. *Olsen,* 262 U.S. 1, 40-41 (1923). Congress has conferred a very special status on members of the Board of Trade and other regulated contract markets: the Act requires (see page 2, *supra*) that all trading in futures contracts be conducted through members of such markets. Congress imposed that requirement in order to permit "careful supervision of those transactions in the national public interest" (*Olsen*, 262 U.S. at 41). Accordingly, under the CEA, anyone who wishes to trade in commodity futures contracts must have its trades "executed or consummated by or

through a member of [a] contract market" (7 U.S.C. 6(a)(2)). Having thus placed members in the neck of the bottle, Congress could surely provide that members must, through their self-regulatory organizations, provide a just and efficient means of resolving customer claims. See generally *Nelson* v. *Secretary of Agriculture,* 133 F.2d 453, 456 (7th Cir. 1943) (member firm is permitted "to engage in a business affected with the national public interest in which * * * [it] may participate only upon compliance with conditions imposed by Congress in the exercise of its power over commerce").

Geldermann chose to have the economic and other benefits of being a member of a federally regulated futures contract market.[8] Those benefits flow, in part, from government regulation itself, which gives investors confidence in the integrity of contract markets, the honesty of their members, and (not incidentally) the availability of remedies for the misconduct of members.[9] Such membership is not essential to engage in the business of trading in futures contracts; indeed, FSI is a "futures commission merchant" under the Commodity Exchange Act[10] but not a member of the

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[8] That choice, and Geldermann's agreement to be bound by the Board of Trade's arbitration rule (87-1584 Pet. App. 15), led the court of appeals to conclude that Geldermann "waived" any personal right to an Article III forum. The court meant, as we read its opinion, only that Congress may provide that those who choose to be members of a regulated futures market must agree to an efficient and fair procedure for resolution of customer claims.

[9] Geldermann's president noted that membership in a regulated market is "reassuring to significant commercial customer entities" (87-1584 Pet. App. 45).

[10] A "futures commission merchant" is any person that solicits or accepts "orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property * * * to margin, guarantee,

Board of Trade (87-1584 Pet. App. 29). But Congress has determined that those firms, like Geldermann, that seek and obtain membership in a designated contract market, and thus join the select group through which others must deal, should agree to submit to fair and equitable arbitration of customers' claims in order to permit their efficient resolution.[11] That congressional determination has the same rational and constitutional bases as the determination that those who choose to participate in the FIFRA registration process (*Thomas*) or those who seek reparations from the CFTC (*Schor*) must thereby agree to non-Article III resolution of certain claims against them. Cf. *Shearson/American Express Inc.* v. *McMahon,* No. 86-44 (June 8, 1987), slip op. 17 (enforcing agreement to arbitrate claims under the Securities Exchange Act in light of SEC's "statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights").

3. Petitioners also argue that Section 5a(11) and the Commission's arbitration rule violate the "structural" principle of Article III (87-1584 Pet. 19; 87-1663 Pet. 22-25),

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or secure any trades or contracts that result or may result therefrom" (7 U.S.C. 2). It is unlawful for any person to act as a futures commission merchant unless he is registered as such with the Commission. See 7 U.S.C. 6d(1).

[11] This Court has consistently respected Congress's decisions to encourage or compel arbitration of claims. In *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), the Court said that the Arbitration Act (9 U.S.C. 1 *et seq.*) manifests a "liberal policy favoring arbitration agreements." This "policy requires that [the Court] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc.* v. *Byrd,* 470 U.S. 213, 221 (1985). Indeed, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability" (*Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25 (footnote omitted)).

but they fundamentally misunderstand that principle. In *Schor,* the Court articulated it as follows: "Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts '*to transfer jurisdiction to non-Article III tribunals* for the purpose of emasculating' constitutional courts, and thereby preventing 'the encroachment or aggrandizement of one branch at the expense of the other' " (*Schor,* slip op. 16 (citations omitted; emphasis added)). Later in *Schor,* the Court said that Congress risks violating this principle when it "encroache[s] on the federal judiciary" by allocating matters traditionally tried before an Article III court "*to a non-Article III forum of its own creation*" (*id.* at 20 (emphasis added)).[12]

This case involves no transfer of any part of the judicial power to a non-Article III federal forum. Arbitration under procedures established by the Board of Trade is an essentially private dispute resolution mechanism. Arbitrators are privately appointed; under the Board of Trade's rules, the customer has the option of selecting a panel composed of persons associated with the Board of Trade (*e.g.,* traders and brokers) or a panel with a majority of members who are not connected with the Board of Trade. In either case, the arbitrators are not officers of any branch of the federal government, and they do not exercise government power. Their function is not to adjudicate but to resolve disputes without adjudication. Cf. *McDonald* v. *City of West Branch,* 466 U.S. 284, 291 (1984) ("arbitral factfinding is generally not equivalent to judicial factfinding"). In sum, Congress has not "encroached on the federal judiciary" by transferring part of the judicial power "to a non-Article III

[12] In *Thomas,* the Court described *Northern Pipeline Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982), as holding "only that Congress may not *vest in a non-Article III court the power to adjudicate*" certain kinds of claims without the consent of the litigants (473 U.S. at 584 (emphasis added)).

forum of its own creation" (*Schor,* slip op. 20); Congress has merely required that members of futures markets agree to afford an essentially private dispute resolution mechanism for customer claims arising out of transactions regulated under the CEA. Since members may constitutionally be required to resolve customer claims in that manner (see pages 8-12, *supra*), the Article III courts have not been deprived of anything that is rightfully theirs.[13]

4. Geldermann also argues (87-1584 Pet. 10-17) that it has a Seventh Amendment right to a jury trial on FSI's claims. As the court of appeals recognized (87-1584 Pet. App. 26), however, this argument is foreclosed by the fact that FSI validly invoked its statutory right to select a non-Article III forum.

In *Tull* v. *United States,* No. 85-1259 (Apr. 28, 1987), slip op. 5 n.4, this Court recently noted that "the Seventh Amendment is not applicable to administrative proceedings" because of "the practical limitations of a jury trial" and a jury trial's incompatibility "with proceedings outside of traditional courts of law." This comment in *Tull* was essentially a restatement of the holding of *Block* v. *Hirsh,* 256 U.S. 135 (1921), which "stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell* v. *Southall Realty,* 416 U.S. 363, 383 (1974).

Arbitration, of course, is equally incompatible with jury trials. The very purpose of arbitration is to provide an efficent decision-making process without the complex procedures attendant to traditional court litigation. Accordingly, it follows from the fact that Congress may give

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[13] Congress has not, of course, attempted to "withdraw from judicial cognizance" (*Schor,* slip op. 20) the entire subject matter of customer claims; it has simply given the customer the option of invoking arbitration.

customers of members of contract markets the option of asserting claims against those members in arbitration, that the Constitution does not guarantee members a right to a jury trial on such claims. The cases cited by petitioners (87-1584 Pet. 11; 87-1663 Pet. 20) do not hold otherwise. They simply stand for the proposition that Geldermann might have had a right to a jury trial had FSI brought its claims in a federal court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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No. 87-1584

IN THE

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OCTOBER TERM, 1987

GELDERMANN, INC., and
BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioners,

vs.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

		PAGE
1.	The Questions Presented Are Wrong	1
2.	The Diverse Status Of The Litigants Suffices To Raise The Article III Question	3
3.	Geldermann's "Real" Claim Is Not Against All Mandatory Arbitration	4
4.	Under The Reasoning Of *Thomas*, Geldermann Has Not Waived Its Right To Assert Its Constitutional Claims	4
5.	Compulsory Arbitration Of Common Law Claims Offends The Structural Principle Of Article III	5

TABLE OF AUTHORITIES

CASES:	PAGE
Brunner v. United States, 343 U.S. 112 (1951) ...	3
CFTC v. Schor, ___ U.S. ___, 92 L.Ed.2d 675 (1986)	3, 5
Myron v. Hauser, 673 F.2d 994 (8th Cir. 1982) ..	2, 4
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	2, 3, 4
Rosenthal & Co. v. Bagley, 581 F.2d 1258 (7th Cir. 1978)	2
Thomas v. Union Carbide Agricultural Products Co., et al., 473 U.S. 568 (1985)	2, 4, 5

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REPLY BRIEF FOR PETITIONER

The Commission's counter to Geldermann's petition is misleading and flawed:

1. The Questions Presented Are Wrong.

Though its misleading response belies it, the Commission knows well the question presented by Geldermann's petition is *not* whether the "Commission exceeded its stat-

utory authority or acted arbitrarily in adopting a rule requiring members of the Chicago Board of Trade to arbitrate customers' claims at the customers' option", Brf. in Opp. i, but, whether it did so in requiring members unwillingly to arbitrate customers' *common law* claims unrelated to the Commodity Exchange Act and the agency's Regulations. See Pet. at i, 14-17, 19-21. Geldermann does *not* contest the right of Congress and the Commission to require Board of Trade members to arbitrate customers' claims which arise under rights created by the Act or its Regulations. See *Thomas v. Union Carbide Agricultural Products Co., et al.*, 473 U.S. 568 (1985). It is Geldermann's position that since neither the Congress nor the Commission created the "private" right of FSI to sue Geldermann in *indebitatus assumpsit*, trespass on the case, or on a contract, Pet. at 15-16—a right which existed long before either the Commission or the Congress came to be—adjudication of the right is reserved to an Article III court with a concommitant right to a trial by jury. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

At stake in this petition is not the compulsory arbitrability of "customer claims" in general but rather only of such claims that involve purely common law issues not arising under the Act or the Commission's regulations. The Commission's overly broad statement of the question should not be permitted to obscure or diminish the importance of the real point in contention.

It may well lie within the Congressional power to compel, at the customer's option, a non-jury, non-federal court determination of violations of substantive rights *created by the Commodity Exchange Act, Myron v. Hauser*, 673 F.2d 994, 1001-1004 (8th Cir. 1982); *Rosenthal & Co. v. Bagley*, 581 F.2d 1258, 1261 (7th Cir. 1978) or to permit the Com-

mission to entertain, against the customer's wishes, a common law counterclaim in a reparation proceeding initiated by the customer with knowledge that by so initiating the proceeding he consents to the counterclaim. *Commodity Futures Trading Commission v. Schor*, ____ U.S. ____, 92 L.Ed.2d 675 (1986). Those, however, are not the narrow circumstances Geldermann presents in this case.

2. The Diverse Status Of The Litigants Suffices To Raise The Article III Question.

The Commission contends there is no Article III issue in this case because Geldermann (an Illinois corporation) could not have removed to an Article III court had FSI (a New York corporation) asserted its common law claims in an Illinois court. Brf. in Opp. at 9. Again, those are not the circumstances presented here. FSI has not sued Geldermann in an Illinois court. It has sought to settle common claims before a non-Article III arbitrator against Geldermann's will just as Marathon sought to compel Northern Pipeline to adjudicate common law claims before a non-Article III bankruptcy judge in *Northern Pipeline Co. v. Marathon Pipe Line Co., supra*, 458 U.S. at 56. The existence of a hypothetical fact pattern in which Geldermann would be foreclosed from an Article III forum no more extinguishes the Article III issue here than it did in *Northern*. As the Court of Appeals noted, "actual or potential diversity" exists for Geldermann, App. 22-23, and while Geldermann may not have a constitutional right to have its common law claims adjudicated in a federal court or to remove to federal court in *all* cases, it does have a constitutional right not to be compelled to accept arbitration of its common law claims under the facts presented. Congress was not required to create diversity jurisdiction, *cf. Brunner v. United States*, 343 U.S. 112 (1951), but having done so and, as the Commission con-

cedes, Br. in Opp. at 14, n. 3, having not withdrawn member-customer common law claims from judicial cognizance, it is prevented by Article III from foreclosing litigants like Geldermann and Marathon from invoking it for resolution of those claims.

3. Geldermann's "Real" Claim Is Not Against All Mandatory Arbitration.

The Commission raises another straw man in asserting that Geldermann's "real" claim, Br. in Opp. at 9, is that exchange members have a constitutional right to refuse arbitration. It may be conceded, *arguendo*, that Congress can compel arbitration of certain types of customer disputes such as those arising under the Act. *Cf. Thomas v. Union Carbide Agricultural Products Co., supra*; *Myron v. Hauser, supra.* The claims here, however, do not arise under the Act or its Regulations or under any other category of right for enforcement of which the courts have permitted compulsory arbitration. They involve garden variety common law claims unrelated to matters regulated by the Act and are at the heart of Article III protection.

4. Under The Reasoning Of *Thomas*, Geldermann Has Not Waived Its Right To Assert Its Constitutional Claims.

Thomas may indeed hold that Congress is free to condition a broker's "choice" of being a contract member on its agreement to "non-Article III resolution of *certain* claims" against it (emphasis added). Br. in Opp. at 11-12. But the Commission realizes that the "arcane distinctions", *Northern Pipeline Co. v. Marathon Pipe Line Co., supra*, 458 U.S. at 90, which characterize Article III analysis make clear that the type of claim in issue may determine the constitutionality of the condition. Neither *Thomas* nor any other decision of this Court permits Congress to remit to mandatory arbitration common law claims

wholly unrelated to the subject matter Congress has undertaken to regulate. The implications of such a proposition—adopted by the court below—are far reaching, see Pet. at 26, and must be addressed by this Court as a matter of compelling public interest and constitutional concern.

5. Compulsory Arbitration Of Common Law Claims Offends The Structural Principle Of Article III.

It is not clear how the Commission can seriously argue that Section 5(a)11 does not implicate the structural concerns of Article III when it subjects common law claims unrelated to the Act to compulsory arbitration. Br. in Opp. at 13. The Commission apparently rests this conclusion on its view that only transfers of jurisdiction to non-Article III "*federal*" fora or fora of Congress' "own creation" raise structural concerns and that because Board of Trade arbitration is not a federal forum or one created by Congress, *id.*, the structural interest is not compromised. This view misapprehends the structural consideration. What is proscribed by Article III is an attempt by the Congress to remove from the Judiciary and transfer anywhere matters traditionally tried by the constitutional courts. In the present case, it is the transfer, not the nature of the transferee tribunal which is relevant. This Court did not suggest in *Thomas* that it would have struck down FIFRA if the dispute resolution mechanism had been a Congressionally created administrative tribunal rather than an arbitrator. Similarly, the Bankruptcy Act's transfer of jurisdiction over common law claims to the bankruptcy court would not have been any less assailable in *Northern* had Congress chosen an arbitration panel rather than the bankruptcy court as the transferee tribunal for the traditional jurisdiction of the district court. In *CFTC v. Schor*, *supra*, the outcome did not turn on

the fact that the transferee forum was a Congressionally created administrative body but on the fact that Congress had left it to the parties to decide whether or not to litigate common law claims in a non-Article III forum. The customer did so by invoking the reparations procedure and thereby exposing itself to a common law counterclaim related to the subject of the reparations claim—as a counterclaim authorized by the statute; the member by exercising its right if it so wished to assert its related common law counterclaim which it could as well have asserted in a separate judicial proceeding.

In the present case, against a member's will, Congress has transferred to arbitration a case involving the very subject matter over which the constitutional courts exercise jurisdiction in diversity cases—common law claims. It is hard to see how this transfer does not encroach upon the integrity of the Judiciary and aggrandize the power of Congress. If Congress wishes to withdraw diversity of jurisdiction from the federal courts it may repeal §1332. Having afforded those courts that jurisdiction, however, it may not abridge it by relegating the grist for their mill to non-Article III tribunals.

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